

1 UNITED STATES OF AMERICA

2 EASTERN DISTRICT OF MICHIGAN

3 SOUTHERN DIVISION

4 - - -

5 IN RE: AUTOMOTIVE PARTS
6 ANTITRUST LITIGATION

Master File No. 12-md-02311
Hon. Marianne O. Battani

7 _____/

8 STATUS CONFERENCE / MOTION HEARINGS

9 BEFORE THE HONORABLE MARIANNE O. BATTANI
10 United States District Judge
11 Theodore Levin United States Courthouse
12 231 West Lafayette Boulevard
Detroit, Michigan
Wednesday, January 28, 2015

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1 Detroit, Michigan

2 Wednesday, January 28, 2015

3 At about 10:04 1

4 — — —

5 (Court and Counsel present.)

6 THE CASE MANAGER: Please rise.

7 The United States District Court for the Eastern
8 District of Michigan is now in session, the Honorable
9 Marianne O. Battani presiding.

10 All those having business before this Honorable
11 Court, please draw near and you shall be heard. God save
12 these United States and this Honorable Court.

13 You may be seated.

14 The Court calls Case No. 12-md-02311, Automotive
15 Parts Antitrust Litigation.

16 THE COURT: All right. Good morning, everyone.

17 THE ATTORNEYS: (Collectively) Good morning, Your
18 Honor.

19 THE COURT: I didn't expect to see so many of you,
20 I thought that storm might keep some of you away, but we do
21 have several people on the phone. All right. Let's begin
22 the agenda.

23 First of all, I have a question because this is
24 kind of mysterious to me, who actually prepares this agenda
25 and the status report?

1 MR. HANSEL: Your Honor, I take full responsibility
2 but not the blame.

3 THE COURT: Put your appearance on the record.

4 MR. HANSEL: Thank you, Your Honor. Greg Hansel
5 for the direct purchasers.

6 We usually coordinate it, and we start off by
7 trying to get the plaintiffs to agree and then we try to get
8 the defendants to agree, and if there is a disagreement we
9 put the disagreement in the proposed agenda but they often
10 disappear, and so I hope these are satisfactory to Your
11 Honor.

12 THE COURT: I think they are wonderful, and I just
13 wanted to acknowledge, I didn't know who amongst you was
14 principal for getting this ready, and it is extremely helpful
15 and I particularly like the status report, so I thank you.

16 MR. HANSEL: Happy that's helpful, and I'm sure
17 everyone shares that view because we all do put some work
18 into it, everyone contributes.

19 THE COURT: I'm sure everyone contributes, and if
20 there is anybody who wants something added to the agenda that
21 we don't have there, you know, we kind of get into our
22 protocol I guess for meetings and sometimes maybe don't think
23 of other things, but if anybody ever does, when you get the
24 agenda please do not hesitate to call and say I would like
25 this or talk to counsel to have it added. Okay. Thank you

1 very much.

2 MR. HANSEL: Thank you.

3 THE COURT: Again, I want to thank those that came
4 in, and I know some of you came in a couple days in advance
5 to be here, I know Mr. Morris particularly, but I thank you
6 for doing that. This meeting, it was kind of up in the air,
7 I didn't know if it was going to come off or not come off
8 today, but I'm very, very glad it did. Thank you.

9 I want to, first of all, change the schedule in the
10 agenda because Mr. Esshaki, our master, is here and he's
11 going to have to leave, so I would like to deal with some
12 matters while he's here.

13 Gene, I would like to start first of all with your
14 report, there are pending matters referred to the master, it
15 is number 3 on the agenda.

16 MASTER ESSHAKI: Yes. Thank you very much, Your
17 Honor.

18 Again, I want to thank everyone who I have been in
19 contact with for the professionalism and the level of work
20 that you have provided me.

21 Right now the only matter that I have pending is
22 the discovery protocol in the wire harness cases. We had a
23 conference call on that with the interested parties last
24 Wednesday. The parties were kind enough to prepare the
25 deposition protocol and lay out all of the points that they

1 agreed upon and then highlighted six points upon which there
2 was disagreement. They then each provided me with a position
3 statement as to their respective positions on those six
4 contested points.

5 I conducted a conference call where I believe each
6 side was provided adequate opportunity to argue their
7 respective positions. I -- these were points that could not
8 really be consolidated or mediated, and as a consequence I
9 made rulings and I asked counsel for the defendants,
10 Ms. Romanenko, to redraft the deposition protocol order, to
11 identify those six points in which the master made the ruling
12 so that it would be clear which ones were ruled upon, and to
13 add at the bottom of the order that the order is subject to
14 appeal to Judge Battani pursuant to the order appointing
15 special master. She was then to submit it to counsel for the
16 plaintiffs, obtain their consent as to the language, and then
17 give it to me to be signed and filed with the Court. And I
18 would image that at least one side or perhaps both may take
19 an appeal. So I think the ball is in Ms. Romanenko's court
20 or it may be in the plaintiffs' court, I just don't know.

21 MS. SULLIVAN: Good morning. Maggie Sullivan from
22 Latham & Watkins on behalf of Sumitomo, and I will be
23 speaking on behalf all the defendants on this.

24 Just to clarify, Master Esshaki, you asked me --

25 MASTER ESSHAKI: Yes, you are right. I

1 apologize.

2 MS. SULLIVAN: -- Ms. Sullivan, to draft an order.

3 No apologies necessary, sir.

4 MASTER ESSHAKI: Sorry, Ms. Romanenko.

5 MS. SULLIVAN: We did draft the order and we sent
6 it along to the plaintiffs on Friday last week, and all
7 parties have signed off except for the auto dealers. We
8 received some edits late last night from the dealers that we
9 believe are inconsistent with your rulings on one of the
10 disputes in particular and so we are going to talk with them
11 about that after the hearing and I hope that we would be able
12 to work it out. If we aren't able to we will present it back
13 to you.

14 MASTER ESSHAKI: Please give me an e-mail and let
15 me know what you need of me.

16 MS. SULLIVAN: We will. There was one point that
17 came up during the mediation and also in the submissions
18 related to the deposition protocol that relates to the
19 coordination of depositions generally, and so we wanted to
20 clarify --

21 THE COURT: Coordination amongst the parts?

22 MS. SULLIVAN: Well, we have committed in the wire
23 harness protocol to attempt to coordinate with the other
24 parties in the other cases on the plaintiffs' side
25 depositions, so we have indicated that we will send them --

1 we will notify the plaintiffs -- the defendants in the other
2 cases of the depositions, provide the transcripts subject to
3 the plaintiffs' agreement, and also provide our preparation
4 materials in an effort to avoid duplication across the auto
5 parts cases. And during the course of the submissions and
6 also in the mediation the end payers and auto dealers both
7 represented to us and to the Court that they are dropping or
8 withdrawing their claims based on purchases of replacement
9 parts in the wire harness case, and so we would like that to
10 be confirmed. And we also would like both the end payers and
11 auto dealers to inform the Court as to whether they intend to
12 pursue those claims in the other auto parts cases or whether
13 they have also dropped the claims in those other cases.

14 Thank you.

15 THE COURT: So if I understand you correctly, the
16 auto dealers in the wire harness --

17 MS. SULLIVAN: Correct.

18 THE COURT: -- have dropped the aftermarket -- the
19 replacement parts claims --

20 MS. SULLIVAN: Correct.

21 THE COURT: -- those parts of their cases, okay,
22 but the end payers have not?

23 MS. SULLIVAN: No, the end payers have as well in
24 the wire harness case.

25 THE COURT: Okay.

1 MS. SULLIVAN: So the question is whether they have
2 also withdrawn or are intending to withdraw those claims in
3 the other auto parts cases other than wire harnesses.

4 THE COURT: Thank you.

5 MR. WILLIAMS: Good morning, Your Honor.
6 Steve Williams for the end payers. It is good to see you
7 again.

8 What Ms. Sullivan has said is correct, and we did
9 confirm that with her this morning, that we are not pursuing
10 claims for replacement parts, we are pursuing claims for
11 people who purchased automobiles -- vehicles with price-fixed
12 parts in them.

13 THE COURT: Thank you, Mr. Williams.

14 MR. WILLIAMS: Thank you.

15 THE COURT: Ms. Romanenko?

16 MS. ROMANENKO: Good morning, Your Honor, Special
17 Master Esshaki.

18 With regards to the deposition protocol order, as
19 Ms. Sullivan stated, they sent us their draft, we sent them
20 our edits a couple days later, we believe our edits
21 memorialize what the special master stated but, of course, we
22 are going to meet and confer with them so we can avoid any
23 further disputes and get the order to the master for entry.

24 With regard to the replacement part issue, as
25 Ms. Sullivan stated, we have agreed to withdraw claims with

1 regard to replacement parts in wire harness, we are reviewing
2 the other cases and we will let defendants know our
3 determination as quickly as possible.

4 THE COURT: Thank you. Ms. Sullivan?

5 MS. SULLIVAN: I apologize, but it was not entirely
6 clear what the end payers' position is with respect to the
7 other auto parts, whether he was speaking -- Mr. Williams was
8 speaking just in the wire harness case or across all the auto
9 parts cases. I just want to make sure it is clear.

10 THE COURT: Mr. Williams?

11 MR. WILLIAMS: Thank you. I apologize if I was not
12 clear but, yes, what I said about pursuing claims for people
13 who purchased or leased automobiles with the price-fixed
14 parts in them applies across the board to all the cases we
15 presently have filed. We are not pursuing damage claims for
16 replacement parts, only parts.

17 THE COURT: In any of the cases?

18 MR. WILLIAMS: Correct.

19 THE COURT: Thank you.

20 MR. WILLIAMS: Thank you.

21 THE COURT: Okay. Something has come up, and this
22 may be a first time when I run into a master, as I said, I
23 haven't used a master before, but I have been thinking about
24 this deposition protocol and I know -- I can't get into
25 details with Mr. Esshaki at all because I may be doing

1 appeals for it, but let me put my two cents' worth in here.

2 I was thinking about the depositions for the
3 individual plaintiffs in all of the auto parts. I have been
4 thinking about the issue, do you take a deposition of each
5 plaintiff in each part? That's impossible, that is not going
6 to happen. First of all, certainly end payers and, unless
7 somebody could convince me otherwise, auto dealers don't buy
8 cars by parts, they buy the car. Certainly your end payers
9 probably don't even know these parts exist in their cars. So
10 I would assume, and I don't know this, but I would assume
11 what you want to know is about how much they paid for the car
12 and where they purchased the car, that type of thing. And I
13 would also assume that that's true for every defendant would
14 want this basic information and that this can all be done in
15 one deposition of a named plaintiff.

16 I don't know in detail what you have discussed in
17 your protocol but, you know, maybe I'm jumping the gun here
18 but I'm throwing this out because this case has to move along
19 with a little more swiftness, and that is that it is my
20 intention to do something -- I mean, if we have to innovative
21 we will be innovative but that there be one deposition.

22 So, Mr. Williams, before I go on, go ahead.

23 MR. WILLIAMS: I just want to respond, Your Honor,
24 to your point. This actually was a matter that the parties
25 discussed and mediated with Mr. Esshaki.

1 THE COURT: See, I'm already interfering with --

2 MR. WILLIAMS: It is in the proposal but I don't
3 think that rules out us and the defendants and the master, if
4 he's so willing, from evaluating this in light of the
5 comments that you have made today. I think we are all in
6 favor of efficiencies.

7 THE COURT: Well, I have thought about this and I
8 know particularly from defendants' point of view, I mean,
9 maybe each defendant has something unique they want to do so
10 I thought about this, well, okay, defendants, and you haven't
11 even answered yet, a lot of you, but that's okay, discovery
12 can start anyway, we don't need to have the answers to do
13 discovery, under the rules I can allow it and, of course, I
14 am in this case. You can if you want, each of you, submit
15 questions you would ask of a plaintiff, be it an auto dealer
16 or an end payer, I don't think the OEMs are a big deal, but
17 in terms of those two groups you can also submit questions
18 and then either the master or myself could call those
19 questions so that you would literally have your questions
20 asked, so when the person comes in he's going to be asked the
21 question, or she, only one time, and you could decide for
22 yourself a group of you that will be taking these depositions
23 using this script.

24 Or another way of doing it is a group of you could
25 get together and come up with one set of questions so you're

1 not all doing it. Either -- which way I don't care but I
2 want you to have the opportunity to ask, you know, to get the
3 information you need and at the same time only do a single
4 deposition of most of these named plaintiffs. Granted there
5 may be something that comes up that would require an extra
6 deposition, I don't know what that could be, you would know
7 that, and we would deal with that, but that's kind of what I
8 had in mind for the depositions. So I just throw that out so
9 when you are doing your protocol it may be a little late but
10 I've just been thinking about this.

11 Ms. Sullivan?

12 MS. SULLIVAN: I do think that the language that
13 Master Esshaki has instructed the parties to include in the
14 protocol does envision the types of things that you may be
15 thinking about in terms of cooperating with each other and
16 trying to avoid duplication. This is one of the reasons why
17 I asked for clarification regarding replacement parts because
18 speaking only on behalf of the wire harness defendants, not
19 on behalf of any defendant in any of the other cases, for us
20 it seems much more likely that we will be able to accomplish
21 having only a single deposition of the end payers when if it
22 is true that that's all that they are claiming is damages
23 based on the purchase of a car, and that applies in all of
24 the cases. Again, I'm not speaking on behalf of any of the
25 other defendants in those other cases but I do expect that we

1 should be able to accomplish what you are envisioning with
2 respect to the end payers.

3 The auto dealers are differently situated. First,
4 they have not yet withdrawn their replacement part claims in
5 the other cases and that will make a difference, I suspect,
6 because if they are claiming damages based on those other
7 purchases of the other parts the parties in those other cases
8 will need to explore the prices that they paid, whether the
9 prices were negotiated, the prices for which they sold those
10 parts, et cetera, et cetera, and so that will add to the
11 complexity significantly.

12 THE COURT: Unless they drop as they did in the
13 wire harness?

14 MS. SULLIVAN: Correct. In addition, the auto
15 dealers are more complicated as well because of where they
16 sit in the distribution chain, so not only do we need to
17 explore their purchases of cars but also their sales of cars,
18 and that relates to the pass-through issue that Your Honor
19 identified back in the motion to dismiss ruling back in 2013
20 I believe. So those are more complicated depositions. We
21 are hopeful that we will be able to avoid as much duplication
22 as possible. We are making -- we have committed to using our
23 best efforts to do that, and we will take every step that we
24 can think of to try to avoid duplication.

25 THE COURT: Okay. Well, there is not going to be

1 duplication unless it comes before me first that you need a
2 second deposition, let me start with that, because we just
3 cannot start doing two depositions or more of everyone, so
4 I'm not barring it, I'm just saying I need to know why.

5 MS. SULLIVAN: Your Honor, for the wire harness
6 defendants, our primary concern is that our depositions are
7 not delayed and because many of the other cases are far
8 behind us we have been concerned that if there is a ruling
9 that only one deposition may occur across the entire auto
10 parts MDL that we will then have to wait for those other
11 cases to catch up, and it is very important to us that we not
12 have to wait. As you know, we have been in discovery in this
13 case for a very long time, and we would like to move forward
14 with our depositions.

15 THE COURT: Well, you may have to wait, you may
16 have to wait. I don't think this is a big deal. I think
17 that every one of these defendants knows right now what
18 information they want from each person.

19 MS. STORK: Your Honor if I could just say a word?
20 Good morning. My name is Anita Stork and I represent
21 Alps Electric, with case number 4, heater control panels, and
22 I also represent another defendant who was just recently
23 served in fuel injection systems, namely Taken (phonetic)
24 North America.

25 I think -- and I know that we are all for

1 efficiency and coordination as much as possible, but I think
2 one issue to consider is that the deposition protocol so far
3 has only been negotiated between wire harness defendants and
4 plaintiffs in auto dealers, end payers and also directs, but
5 the defendants in the later cases haven't been involved in
6 that at all so it is a little bit difficult to say that
7 negotiations that one set of defendants is doing now is going
8 to bind everybody in the subsequent 24, 25, however many
9 cases there are.

10 I'm not saying that we are not eager to do this,
11 I'm just saying that some defendants really aren't in a
12 position to know because they have just been served or are
13 recently in the case to know exactly what information they
14 need, and that submitting questions really is no substitute
15 for at some point being able to ask additional questions if
16 you think that's needed. I mean, I certainly wouldn't
17 contradict anything Your Honor has said -- the Court has said
18 about the approach to it, I'm just suggesting that, one,
19 these later defendants haven't been involved in this
20 negotiation but that secondly one alternative for the Court
21 to consider would be to have depositions of the named
22 plaintiffs sooner rather than later but then keep in reserve
23 like an extra two hours if defendants in later cases feel
24 like they have to ask additional questions and can make a
25 case to the Court that these are additional questions that

1 need to be asked. It is just very difficult when you have
2 only just been served and other defendants have been in their
3 wire harness case for four years to immediately know what
4 your client who just got the summons really needs to ask.

5 THE COURT: Okay.

6 MS. STORK: Thank you, Your Honor.

7 THE COURT: Mr. Williams?

8 MR. WILLIAMS: Just speaking on behalf of end
9 payers, we are all in favor of doing whatever we would need
10 to do to avoid duplication. We had offered across all the
11 cases to make our discovery responses in the first cases
12 available to all defendants, and we think that it makes a lot
13 of sense to think of ways to avoid the duplication. I think
14 the suggestions the Court made makes a lot of sense. From
15 the top of my head, an alternative could also be a set of
16 depositions upon written questions for the basic facts of
17 purchases. There are a lot of creative ways -- really not
18 that creative ways to do this to create efficiencies that the
19 Court is talking about, and we for the end payers will do
20 everything we can to make that happen and to not cause any
21 delay for defendants whether they have been in the cases or
22 whether they are new defendants.

23 THE COURT: All right.

24 MR. KANNER: Good morning, Your Honor.

25 Steve Kanner on behalf of direct purchasers.

1 We have been listening with interest, and we have
2 been involved in these discussions. Of course the direct
3 purchasers are in a slightly different position, there are
4 certainly fewer plaintiffs in each of these cases. And with
5 respect to wire harness I believe the protocols have largely
6 been worked out in an extremely cooperative fashion. Of
7 course, we also buy the product somewhat differently than the
8 end payers, we are not buying the cars, we are actually
9 buying the parts directly, but certainly off the top of my
10 head I think three plaintiffs who bought -- at least two who
11 bought wire harness parts and other parts, Findlay and ACAP,
12 and certainly another client, Tiffin, purchased four or five
13 different parts directly from the defendants, so we are
14 certainly in favor of doing whatever is necessary to make the
15 process more efficient and to have these people sit for one
16 deposition as opposed to four and five separate times.

17 It makes sense -- it certainly makes sense from the
18 standpoint of the economy of efforts by the attorneys as
19 opposed to all going to four and five separate depositions,
20 we can do it at one time. And to the extent that we can do
21 this in a written form beforehand, certainly the purchase
22 information, the defendants from whom we have purchased know
23 exactly what our clients have purchased, when and for how
24 much. So that ought to be considered in terms of how we
25 streamline this process, and we are certainly open to, as

1 Your Honor suggested, being creative and innovative.

2 THE COURT: Okay.

3 MR. KANNER: Thank you, Your Honor.

4 MS. SULLIVAN: Your Honor, just very briefly to
5 respond to one of Mr. Williams' suggestion about some form of
6 written questioning. We have served written discovery
7 requests on the plaintiffs and really have not been able to
8 collect the information that we need from them. We really do
9 need to move forward with depositions. We've been working
10 hard with the plaintiffs to set a class certification
11 schedule, and I believe that that proposed schedule will be
12 filed today with the Court, so we have succeeded in agreeing
13 upon a schedule and it really is critical that we move
14 forward now and take the depositions that we need in the wire
15 harness case so that we can meet those deadlines for class
16 certification that the parties agreed upon.

17 THE COURT: All right. I have to tell you, even
18 though I want you to go ahead with the class cert for the
19 wire harness as we discussed at our last meeting, and, again,
20 I think we mentioned this at the last meeting, I don't know
21 that that's going to be the way it is going to go for the
22 future but we need to get one of these class certs under our
23 belt so we see where we are heading, but, but I am not going
24 to allow the depositions to go forward on the one part, I'm
25 simply not going to do that. You will have to get together

1 and there is some urgency here because wire harness does need
2 to proceed, but you are going to have to do these depositions
3 on behalf of all of the defendants.

4 I'm not asking you to do them written first, you
5 can start taking your depositions, but what we need to know
6 what's the template, what's the template of the questions
7 that are going to be asked, and who amongst the defendants --
8 which groups are going to actually be taking the depositions.
9 So you will have to get together, form a group of, I don't
10 know, three, four, five -- well there are a lot of defendants
11 so you can decide how many you want to take the depositions
12 but only one person is going to be questioning at a time.
13 And we are going to hold it up because I think it is well
14 worth it to extend the class cert a little bit in order to
15 get this all done, but I really don't see any reason why it
16 could not be done with, for the most part, a single dep. And
17 I say for the most part because I really -- you know your
18 cases and you know there may be something specific that you
19 have to ask but how you do it I don't know.

20 And, Gene, I would like to address to you because
21 this may change whatever you have done in the protocol, but
22 we need like a time period in which the defendants can submit
23 either individually their list of questions they would ask
24 each end payer and each auto dealer, recognizing the auto
25 dealers may be a little different than the end payers, or

1 time for all of the defendants to have their representatives
2 get together and come up with one format.

3 MASTER ESSHAKI: Judge, I think your ruling just
4 now alters completely the deposition protocol that we
5 discussed and I ruled upon, and I think the parties are going
6 to have to get back together and redraft that deposition
7 protocol to implement what I think was a direct instruction
8 that there will be one dep of each end payer or whoever it
9 may be and it is going to cover all the parts so that the
10 defendants need to get together, they need to come up with a
11 template of what the deposition outline is going to look
12 like, all of the parts the defendants will have input into
13 that, if they have any particular questions they can add
14 those questions, and they will designate who's going to be
15 conducting the examination.

16 But the problem here is that, as we said during our
17 discussions, there are approximately as I remember 50
18 dealers, there were four deps, we agreed I think on the 50
19 dealers, that's 200 deps, maybe there were less, I think in
20 my mind it is 160, but if we have to do that for wire harness
21 and then for air bags and then for motors it is impossible.
22 So the judge, I think, made this instruction very clear, one
23 dep, one person, across all parts and you need to figure out
24 how you are going to do that, and we need to start from
25 scratch on that protocol, salvage as much as you can but we

1 need to feed in the judge's new ruling.

2 THE COURT: So, Gene, before we go on, you are
3 agreeing with what I said?

4 MASTER ESSHAKI: I agree completely.

5 THE COURT: I don't want to have a run-in with my
6 master.

7 MASTER ESSHAKI: I agree completely, I think
8 otherwise you are going to have thousands of depositions in
9 this case.

10 MR. WILLIAMS: Your Honor, once we receive a
11 transcript, which we will order today, we will promptly put
12 together a revised draft keeping as much as we can from what
13 was done, send it to the defendants so we can take care of
14 this without delay.

15 THE COURT: Let me say I am going to set some
16 deadlines here. Do you think -- the defendants, do you think
17 in 45 days you can come up with such a template, I mean,
18 questions together? And also those who just entered in
19 response to what was said here -- I'm sorry, I forgot your
20 name?

21 MS. STORK: Anita Stork.

22 THE COURT: Okay. In terms of what you said just
23 coming in the case and maybe not knowing, I want you to
24 participate and, yes, there may be things as you do your
25 preliminary discovery that you decide that you need to ask

1 then just bring that to my attention, but I think after, you
2 know, at least the first 20 of you have to be ready and know
3 the case well enough to come up with a template that there is
4 probably not much more any one party would ask but, you know,
5 it may be, I don't know, I just don't want you to think that
6 you are barred, it is just that we have to proceed.

7 MS. SULLIVAN: Your Honor, may I just ask a point
8 of clarification? Are you requesting that we submit a
9 template to Master Esshaki or to other parties or just among
10 the defendants in the various cases? We agree amongst
11 ourselves --

12 THE COURT: You can do whatever you want.
13 Hopefully you come to terms amongst yourself and you don't
14 have to bother Mr. Esshaki, these are the questions -- we as
15 a group are saying these are the questions that we need to
16 ask of every named party. Okay. If you can't do that then
17 I'm going to say submit your conflicting whatever -- I'm
18 calling them templates for want of any better word, and then
19 Mr. Esshaki can determine which questions will be asked.

20 MS. SULLIVAN: Thank you. With respect to the
21 protocol itself, the wire harness protocol, the parties have
22 been negotiating that protocol since February of 2014, and
23 this issue that you are identifying that relates to the
24 number of times an end payer or an auto dealer may be deposed
25 throughout the entire auto part MDL really only impacts a

1 couple of the provisions, so I would like to suggest that we
2 move forward with the wire harness deposition protocol and
3 just revise those provisions to account for Your Honor's
4 ruling. I think we can accomplish that without significant
5 delay and we can get moving with the -- or enter the wire
6 harness protocol as negotiated by the parties in the wire
7 harness case.

8 THE COURT: Wonderful, if you can do that quickly
9 I'm all for it but you have to get all of these other
10 defendants to join in with you.

11 MR. WILLIAMS: I know Mr. Barrett wants to speak,
12 but that's more or less what I just said I would do, I will
13 receive the transcript and revise those portions that are
14 affected by what we have discussed today.

15 MR. BARRETT: Right, and auto dealers concur with
16 that.

17 THE COURT: All right.

18 MS. STORK: Your Honor, I would just say -- repeat
19 again that the defendants in the later cases certainly are
20 all for efficiency. I would just suggest again that there be
21 some type of stopgap measure if parties in the later cases at
22 some point as those cases progress and motions have gone
23 through and discovery actually begins that they could apply
24 to the Court or Mr. Esshaki for permission for additional
25 questions if that's needed. It may not be, I guess I'm just

1 suggesting that --

2 THE COURT: I agree with you, don't worry about it.

3 MS. STORK: Okay.

4 THE COURT: Okay.

5 MS. STORK: Thank you.

6 THE COURT: If there is something that comes up and
7 you haven't thought about it then I will entertain that in
8 the future. I am, of course, depending upon all of these
9 legal brains to think of everything up front. Okay.

10 So with that let's see if we can't have a revised
11 protocol, Gene, maybe in 45 days.

12 MASTER ESSHAKI: Yes, Your Honor.

13 THE COURT: All right. Now, the next issue that I
14 would like to get to before we go to the beginning of the
15 agenda is the class cert deadlines which may have been -- you
16 said you've worked something out, and I would like to know
17 whether this would change what you have worked out?

18 MR. BURNS: Good morning, Your Honor. Warren Burns
19 for the end payers, and I believe Steve Cherry will be
20 joining for the defendants.

21 We actually have worked out a stipulation -- a
22 proposed stipulation that we had planned on submitting to you
23 today. I think in light of this ruling we probably want to
24 have a discussion about whether those dates make sense, and I
25 haven't had a chance to confer with Mr. Cherry yet.

1 THE COURT: Okay.

2 MR. BURNS: But we were prepared to go forward with
3 that. The deadlines that we were going to propose for the
4 initial motions was July 1st, 2016 but I'm happy to go back
5 and quickly confer with Mr. Cherry and see if we need to add
6 just those dates at all in light of your ruling.

7 THE COURT: Your motion for cert was July 1st,
8 2016? Okay.

9 MR. BURNS: Built into the stipulation, Your Honor,
10 actually a number of discovery deadlines as well and
11 recognizing the fact that even with your ruling this morning
12 we are facing in excess of 100 depositions in wire harness
13 alone, especially given the number of defendants and what
14 needs to be done there. And the current status of discovery
15 and production of documents in addition to those that were
16 previously produced as part of the DOJ production, but I'm
17 happy to confer with Mr. Cherry and we can --

18 THE COURT: 100 in wire harness alone, so before
19 this you were thinking of 100 times 29?

20 MR. BURNS: No, I don't think that's true, Your
21 Honor, it is going to vary by case and defendant, and there
22 is no formula in that regard.

23 THE COURT: Let's keep it to 100. All right.

24 MR. CHERRY: We can talk but I don't think this
25 should affect the schedule at all. I mean, we were already

1 undertaking a commitment to coordinate with the other cases
2 and I think in particular with the plaintiffs dropping the
3 replacement part claim --

4 THE COURT: Could you speak up a little bit?

5 MR. CHERRY: Yes. Again, I'm Steve Cherry from
6 Wilmer Hale.

7 MR. VICTOR: Your Honor, this is Paul Victor. It
8 is very hard for us to hear not you but the other speakers.
9 I wonder if they can come to the microphone?

10 THE COURT: Let's see if we can -- let me turn this
11 around and see if it helps. Keep your voices up.
12 Mr. Cherry?

13 MR. VICTOR: Thank you.

14 MR. CHERRY: Yes. So I don't believe this should
15 affect the schedule. We were already contemplating just that
16 type of coordination and sharing of our outlines with the
17 other defendants and inviting input and coming up with a
18 master outline, that was already part of our contemplated
19 process so I don't see why this would affect the schedule.

20 MR. BURNS: Mr. Cherry, I have canvassed the --

21 THE COURT: Speak into the microphone so everyone
22 can hear.

23 MR. BURNS: Certainly. I have canvassed the
24 plaintiffs' groups and we are prepared to go forward with the
25 dates that we have negotiated.

1 THE COURT: I know you will prepare an order but
2 will you tell me what those dates are now? You said --

3 MR. CHERRY: Actually it is -- it has been filed
4 so --

5 THE COURT: It has been filed?

6 MR. CHERRY: Yes.

7 MR. BURNS: By memory, Your Honor, July 1st, 2016
8 for the filing of motions for class certification, four
9 months later, which would be November 1st, 2016, would be the
10 responses, and then we have -- I believe it is March 1st for
11 the replies. We have not agreed as to whether sur replies
12 are appropriate, we have kicked that can down the road a
13 little bit, and then there are a number of discovery
14 deadlines built in before those dates.

15 THE COURT: So basically we are talking about
16 arguments maybe in the middle of 2017?

17 MR. BURNS: That's right, Your Honor.

18 THE COURT: Wow. Both sides have agreed to the
19 schedule?

20 MR. BURNS: We have after quite a bit of
21 negotiations back and forth on those points.

22 MR. CHERRY: Yes.

23 THE COURT: Okay. Given the amount of work that
24 needs to be done I think it is reasonable, I also think that
25 the other parts classes should be thinking ahead to do this

1 and it may be able to move along faster and we will get more
2 of these motions resolved in 2017.

3 MR. CHERRY: There is one issue that I think is
4 related to the schedule, Your Honor, and that is discovery of
5 third-party OEMs because that data will be very important for
6 both of us I think to our respective experts' analysis and to
7 our motions. And we have made some efforts and Mr. Williams
8 has made some efforts to talk to each other to try to
9 coordinate on that so we can do that together, and I think
10 there has been from our perspective a little delay in trying
11 to get together on a call and just make sure that we can come
12 to finality on some subpoenas that we can serve to the OEMs
13 so we can do that jointly and do it one time.

14 And I think what we would benefit from is to have a
15 deadline that just sort of holds our feet to the fire so that
16 we can keep our schedule in place and maybe agree within two
17 weeks or just some date that we will either come to agreement
18 on a joint subpoena or go forward together or if we have a
19 dispute I guess submit it to Master Esshaki, but I think we
20 need something here because it is sort of dragging on trying
21 to come to some coordinated process.

22 THE COURT: Well, how does this fit in with the
23 OEMs and all the other defendants? I mean, we are not
24 going to be -- the OEMs especially we don't want to be
25 taking --

1 MR. WILLIAMS: Your Honor --

2 THE COURT: -- a lot of deps.

3 MR. WILLIAMS: Your Honor, that's a very important
4 question, and I want to make a couple points first. We are
5 committed to doing this. We need to do this. In fact, we
6 are the ones who reached out to them in the last month to
7 have this discussion. We don't need an arbitrary deadline
8 imposed though because, as you just noted, this affects
9 third-party OEMs not just in one case or two or three cases
10 but a lot of cases, it relates to my class, the auto dealers,
11 the directs, the City of Richmond and the new truck case, we
12 don't want to delay, we want to do it soon too because this
13 is critical for us but what we don't need is an arbitrary
14 make it happen in two weeks deadline, it is much too
15 important to the case and the schedule to have an arbitrary
16 deadline.

17 We will commit to engaging with them right away,
18 they have sent us a draft, we have a draft we can share with
19 them. My suggestion though would be we have all worked very
20 well with Master Esshaki, if there is a problem that needs to
21 be brought up with the master we can do it that way but we
22 shouldn't set an arbitrary deadline of two weeks or anything
23 like that.

24 THE COURT: Mr. Spector?

25 MR. SPECTOR: Good morning, Your Honor.

1 Eugene Spector on behalf of direct purchasers.

2 I only wanted to say that we would like to
3 participate in this process of defining what is in the
4 subpoenas to the OEMs because that's the class that we
5 represent, and we would like to have some view as to what is
6 going on, what is going to be asked and maybe some input as
7 to what might be in the interest of the OEMs with regard to
8 that. We are in regular contact with them in any event and
9 we would like to see what we can do to help move this process
10 along so it works for all of us.

11 THE COURT: You can talk to counsel and participate
12 in that. I don't think that's a problem. You all have to
13 work together.

14 MS. SPECTOR: We have, Your Honor.

15 THE COURT: Mr. Cherry?

16 MR. SPECTOR: Thank you.

17 MR. CHERRY: Your Honor, again, we can coordinate
18 with the other defendants and try to do this in the most
19 efficient manner possible, but it is -- it will be very
20 difficult to do this one time with the OEMs because we are
21 talking about different products being purchased by them and
22 they do have different divisions and different product groups
23 that do that purchasing, it is not even the same people, it
24 may be different data in different places we are seeking.
25 The downstream data ought to all be the same, you know, the

1 cars coming from the auto manufacturers we can obtain that
2 one time and it will fit every case, but the purchasing may
3 be different and we can coordinate with the other defendants
4 to be efficient as possible and minimize that but --

5 THE COURT: Well, I think that's all that can be
6 asked, if you can coordinate those parts that make sense I
7 think you can do that. And, I mean, I wouldn't think you as
8 defendants would want to irritate your OEMs.

9 MR. CHERRY: Exactly, Your Honor, exactly. And the
10 idea of an arbitrary deadline, I think these things, as
11 Ms. Sullivan mentioned, our deposition protocol, which took
12 from February until now to get resolved, is this can't take
13 six months or no schedule is going to stick. I think --

14 THE COURT: Okay. Let me --

15 MR. CHERRY: -- whatever the deadline is we have 30
16 days, some period of time --

17 THE COURT: Let me do this, I have given you
18 45 days on the other one, I will give you 45 days on this one
19 max. If you can do it sooner, wonderful. If you need to --
20 if that's not suitable then you have an issue and you will
21 have to bring that up before Mr. Esshaki.

22 MR. CHERRY: Thank you, Your Honor.

23 MR. WILLIAMS: Your Honor, I apologize but just to
24 clarify, 45 days to do what? They -- I think that Mr. Cherry
25 was saying was 45 days to actually serve the discovery.

1 THE COURT: No, no, just to coordinate all of it.

2 MR. WILLIAMS: Certainly. Thank you.

3 THE COURT: Okay. Anything else on discovery or
4 other protocols?

5 (No response.)

6 THE COURT: Mr. Esshaki, anything else?

7 MASTER ESSHAKI: No, Your Honor, I have nothing
8 further.

9 THE COURT: Okay. Ms. Sullivan?

10 MS. SULLIVAN: Yes, Your Honor. Mr. Williams
11 mentioned the new truck dealer class complaint, and I just
12 want to confirm that all of these deadlines that Your Honor
13 is imposing will, in fact, apply to the truck dealer
14 plaintiffs as well. I know that one of their lawyers
15 submitted a letter to Your Honor I believe yesterday
16 indicating that they expected that they would have different
17 deadlines and a different schedule, and we would like them to
18 be on the same schedule. It is very important that they --

19 THE COURT: But they won't have different deadlines
20 on what we are talking about now unless something comes up,
21 as I indicated for the later groups, that requires something
22 different but that's going to have to be brought specifically
23 to the Court's attention.

24 MS. SULLIVAN: Thank you, Your Honor.

25 THE COURT: Okay. All right. Let's go back to one

1 on the agenda, the status of the settlements.

2 MR. WILLIAMS: Your Honor, Steve Williams, again,
3 for the end payers. I'm here with John Cuneo.

4 We are very pleased to announce to the Court that
5 we have arrived at a settlement with the Hitachi defendants.
6 Hitachi are defendants in nine separate cases, and this will
7 resolve end payer and auto dealer claims against Hitachi in
8 all of those cases. We are hard at work on the final written
9 settlement agreement, and we would hope to present that to
10 the Court well before the May 6th date, I think that's our
11 desire and I think Hitachi shares this, would be to have this
12 done if we can within the next 30 days, present it to the
13 Court for preliminary approval. And I would add to that that
14 as the Court may recall, we have reached agreement with
15 Panasonic and we have made progress on finalizing that
16 agreement, and what I would hope we could do would be to
17 consult with the parties and identify a date for which
18 preliminary approval of both Panasonic and Hitachi can be
19 presented to the Court in the next 30 to 45 days.

20 THE COURT: Mr. Cuneo?

21 MR. CUNEO: Just to be clear, I represent the auto
22 dealers. I second everything he said, and we would like to
23 at least pencil in a date for preliminary approval and
24 maybe --

25 THE COURT: What are you thinking of?

1 MR. CUNEO: March 1st, somewhere around there.

2 THE COURT: Okay. Just one minute.

3 MR. CUNEO: Somebody here said March 1st is a
4 Sunday.

5 THE COURT: So we are all available, right?

6 MR. CUNEO: Maybe later in the week.

7 THE COURT: Yes, March 2nd is Monday.

8 MR. WILLIAMS: Your Honor, I have been consulting
9 with counsel for Hitachi, and at least for Hitachi and us we
10 are thinking essentially any date the first or second week of
11 March.

12 THE COURT: I have an afternoon on Wednesday,
13 March 1st, it would be in the afternoon, is that --

14 MR. WILLIAMS: That's fine for the end payers.

15 MR. CUNEO: That's fine for the auto dealers.

16 THE COURT: Okay. So I'm going to put down
17 March 11th at 2:00.

18 MR. ATKINS: Your Honor, Alden Atkins for Hitachi,
19 and I have with me Craig Seebald, and that date works for us.

20 THE COURT: Works for you. Okay. Good.

21 MR. ATKINS: The one thing I would add with respect
22 to Hitachi is we have pending a motion to dismiss in the
23 motor generators case which is one of the motions scheduled
24 to be heard today. We would like to suspend consideration of
25 the motion as to Hitachi only, we know that the motion will

1 continue as to Denso, and I believe that Mr. Cherry intends
2 to argue that.

3 In addition, as Mr. Williams stated, we have some
4 cases that are scheduled for motions to dismiss coming up in
5 the next few weeks, that would be valve timing control
6 devices, fuel injectors and inverters, and we would like to
7 follow the same process that Panasonic followed, which is to
8 suspend those dates while we are completing the settlement
9 agreement.

10 THE COURT: We will adjourn all of those matters
11 without a date pending resolution of this. Okay. That takes
12 care of Hitachi, but what about Panasonic, do we have a date
13 for preliminary --

14 MR. WILLIAMS: What I would suggest, Your Honor, is
15 we will confer with Panasonic's counsel after court today and
16 see if the 11th date will work with them as well, if not we
17 will consult with Hitachi and Panasonic and contact the Court
18 with alternate proposed dates.

19 THE COURT: Okay. But right now we are keeping
20 3/11, I'm going to put Panasonic on there, and then you can
21 call to change the date if not so we keep track of that.

22 MR. WILLIAMS: Thank you, Your Honor.

23 MR. BURNS: Your Honor, Warren Burns for the end
24 payers.

25 We actually have a pending settlement with T. Rad

1 as well, and we anticipate that we should be able to move for
2 preliminary approval on the same date. We will confer with
3 T. Rad's counsel and hopefully have it teed up.

4 THE COURT: Mr. Cuneo, you agree with that?

5 MR. CUNEO: Yes, Your Honor.

6 THE COURT: Why don't I put all three of them on
7 for the 11th and if something happens that one of you can't
8 make it we will have to do another date, that's all, and then
9 we have dates for them.

10 MR. CUNEO: Thank you.

11 MR. BURNS: Thank you, Your Honor.

12 THE COURT: Thank you. How about steering angle
13 sensors, is that one of the -- who represents steering
14 angle --

15 MR. WILLIAMS: If my recollection is correct,
16 sensors are part of the Panasonic settlement.

17 THE COURT: And the ballast, is that part of
18 Panasonic?

19 MR. WILLIAMS: I believe they are.

20 THE COURT: And T. Rad, the automotive transmission
21 fluid --

22 MR. WILLIAMS: I'm informed that that is correct,
23 Your Honor.

24 THE COURT: I'm trying to keep track of these
25 parts, you know, I've never heard of them either, so -- all

1 right. That's all of the dates we need to set for the
2 preliminary approvals, right?

3 MR. WILLIAMS: Yes, Your Honor.

4 THE COURT: Okay. Thank you.

5 MR. WILLIAMS: Thank you.

6 THE COURT: Anything else on the status? Do we
7 have any problem on service with the last group or are they
8 all in process?

9 (No response.)

10 THE COURT: No problem. Okay.

11 MR. CHERRY: Your Honor, can I just --

12 THE COURT: Yes, Mr. Cherry.

13 MR. CHERRY: On scheduling, Your Honor set a
14 schedule for responding to a set of the next wave of
15 complaints, wipers and some other things.

16 THE COURT: Just before we do that I want to --
17 there is one other I have down here and I think this is part
18 of the Panasonic -- no, the T. Rad, the radiators, is that
19 right?

20 MR. BURNS: Excuse me, Your Honor, I'm sorry.

21 THE COURT: For the end payers -- the T. Rad for
22 auto dealers and end payer settlement that's going on the
23 11th also?

24 MR. BURNS: Yes, Your Honor, we had planned to do
25 it then, we will confirm with Mr. Simmons, T. Rad's counsel

1 -- I was actually just e-mailing him.

2 THE COURT: Okay. Thank you.

3 MR. BURNS: Thank you.

4 THE COURT: All right.

5 MR. CHERRY: Your Honor, there are two scheduling
6 issues. So Your Honor set a briefing schedule for the next
7 wave of motions, and one of the issues is we have agreed to
8 follow the same sort of briefing that we did with the last
9 wave, so for state law issues there will be one big brief up
10 to 85 pages that can address those issues so we don't have to
11 do it in separate cases.

12 THE COURT: Right.

13 MR. CHERRY: But when Your Honor set the schedule
14 you truncated it and left only one week for the reply and so
15 what we would like -- what the plaintiffs have agreed to is
16 just one additional week, so we have two weeks for that reply
17 because we really need that for that one brief.

18 THE COURT: So the reply would be due when?

19 MR. CHERRY: March 20th rather than March 13th, and
20 that would still give you all the time before May 6th so --

21 THE COURT: May 6th is our next conference?

22 MR. CHERRY: Yes.

23 MR. SELTZER: Mark Seltzer for the end-payer
24 plaintiffs, and we are agreeable to that proposal.

25 THE COURT: Very good. That's fine.

1 MR. SELTZER: Thank you.

2 MR. CHERRY: The only other scheduling issue is for
3 the wipers case, I understand that the direct purchasers
4 intend to file an amended complaint today.

5 MR. HOESE: Your Honor, William Hoese, Kohn, Swift
6 & Graf for the directs.

7 Mr. Cherry and I spoke earlier, and it will be
8 either today or tomorrow, Your Honor.

9 MR. CHERRY: So we are going to receive the
10 complaint today or tomorrow, and as it stands motions are due
11 I think February 13th, and so the plaintiffs are amenable to
12 a two-week extension, so we will keep -- what we propose is
13 to keep the schedule Your Honor proposed but just to move
14 everything two weeks out so we have a little more time with
15 that complaint which we haven't received yet.

16 THE COURT: Okay. When would that end? I would
17 like the end date to see if I can get it down.

18 MR. CHERRY: So two weeks beyond March 13th.

19 THE COURT: So the end of March, and we have April
20 and May?

21 MR. CHERRY: Yes.

22 THE COURT: Okay. That's fine.

23 MR. CHERRY: Thank you, Your Honor.

24 MS. ROMANENKO: Your Honor, just a request for
25 clarification. With regard to wipers I wanted to clarify we

1 are just talking about the directs' motion, the defendants'
2 motion against the directs' wipers complaint and not the
3 motions concerning the end payer and auto dealers'
4 complaints, I assume those deadlines will stay the same.

5 MR. CHERRY: Yes, Your Honor, this -- just because
6 we are just now getting the complaint, everything would stay
7 the same with the auto dealers and end payers.

8 THE COURT: Okay. It is just the amended complaint
9 that is being filed that he needs the extension so direct
10 purchasers only. Okay. Good.

11 MS. SULLIVAN: Your Honor, I have one more deadline
12 request. May we have a deadline for the auto dealers to
13 inform defendants whether they will be withdrawing their
14 replacement part claims?

15 THE COURT: Okay. Auto dealers, who is going to
16 speak for auto dealers? Ms. Romanenko?

17 MS. ROMANENKO: Good morning, again, Your Honor.
18 We think we can inform the defendants by the end of the week.

19 THE COURT: Okay. So let's -- we will just say one
20 week from today. Okay. Any other dates?

21 (No response.)

22 THE COURT: All right. The next item is the status
23 of the temporary stay of the discovery. Is there anyone here
24 from the DOJ, or I will give you the report that they gave
25 us?

1 (No response.)

2 THE COURT: Okay. The DOJ says that the document
3 discovery may proceed on all parts but air conditioning
4 systems and constant velocity boosters and any new part that
5 was filed, which we haven't had any new parts recently.
6 Okay. Counsel?

7 MR. WILLIAMS: Your Honor, Steve Williams for the
8 end payers.

9 In light of the DOJ's position I would like to move
10 the Court that, as we did at the outset of all of these
11 cases, when we began the Court had ordered that defendants
12 would provide to the plaintiffs whatever productions they had
13 made to the Department of Justice. We did that in the first
14 four cases, and that only ceased when the Department came in
15 and asked for the stay. We are not at least today asking for
16 full merits discovery because we know there are motions being
17 briefed, but it has been our experience that those
18 productions of the DOJ documents have significantly advanced
19 our ability to prosecute, understand the cases, to
20 significantly advance our ability to try to resolve cases,
21 and we don't think that there is any justification to change
22 the approach that the Court had taken.

23 THE COURT: So you are basically asking the
24 defendants to give you all of the DOJ documents they
25 received?

1 MR. WILLIAMS: That's correct.

2 THE COURT: They submitted, excuse me?

3 MR. WILLIAMS: Yes. Thank you.

4 THE COURT: Any defendant want to speak on that?

5 (No response.)

6 THE COURT: Okay. Let's follow that same protocol
7 then as to the defendants, if you would submit to the
8 plaintiffs all the documents that you gave to the DOJ.

9 The Government also says that the deposition
10 discovery may proceed on wire harness, fuel sender, heating
11 control panels, instrument panel clusters, bearings, occupant
12 safety systems and anti-vibration rubber parts.

13 Mr. Williams?

14 MR. WILLIAMS: Thank you, Your Honor. I don't have
15 a comment on the deposition discovery, I think that is
16 something we would need to address in light of what we have
17 talked about concerning the deposition protocol and timing
18 because I know some of those cases don't yet have motion to
19 dismiss decisions.

20 I wanted to though step back a moment to the
21 Department of Justice documents and see if we can set a
22 deadline for those productions, and also to confirm that, as
23 was done before, that would include translations of documents
24 that were provided by defendants to the department.

25 THE COURT: How much time did we give defendants in

1 the first four parts, do you recall?

2 MR. WILLIAMS: I have a recollection, I'm not
3 certain but it was about 90 days.

4 THE COURT: Defendants, any comment? Do you think
5 90 days is sufficient?

6 (No response.)

7 THE COURT: Okay. 90 days.

8 MS. STORK: Your Honor, Anita Stork.

9 I'm just asking for clarification. 90 days for the
10 later cases from what triggering date?

11 THE COURT: From what?

12 MS. STORK: What triggering date?

13 THE COURT: Let's say 90 days from now, from today.

14 MS. STORK: Or is it finish of rulings on motions
15 to dismiss because there are a number of cases that just
16 started?

17 THE COURT: No, no, no, just 90 days from today,
18 not from motions to dismiss.

19 MR. HANSEL: Greg Hansel for the direct purchasers,
20 Your Honor.

21 The direct purchasers have conferred with the
22 end payers and the auto dealers, and we are -- in light of
23 the DOJ's new, you know, comments on their stay, we are
24 working on a discovery plan for the next three cases after
25 wire harness, which are instrument panel clusters, heater

1 control panels and fuel senders, similar to the supplemental
2 discovery plan in the wire harness case, with the goal of
3 moving the discovery forward in those cases. So the
4 plaintiffs are working on a proposal which we will eventually
5 present to the defendants on that.

6 THE COURT: Okay. Let me -- I hate to even ask
7 this, but I thought I heard some mumblings that there may be
8 three more parts. Are there more parts that plaintiffs -- is
9 plaintiff -- any plaintiff know about three more parts? This
10 is not from the DOJ so this is --

11 MR. WILLIAMS: Your Honor, Steve Williams.

12 Again, if my memory serves me correct, there are a
13 couple of additional parts, the investigations had become
14 public with some guilty pleas probably a few months ago, and
15 we will be filing those but those could have a slightly
16 different presentation to the Court in terms of the
17 relationship between those parts, which is the reason why it
18 has not yet been filed, but I -- we had hoped to have those
19 filed before today, but they will be filed I think within the
20 next two weeks.

21 THE COURT: Okay. Thank you.

22 MR. CHERRY: Your Honor, with respect to the
23 90 days, can we agree that if we think that's going to be a
24 problem we will discuss it with the plaintiffs and try to
25 come to agreement on another date?

1 THE COURT: Sure.

2 MR. CHERRY: Because we are in several cases and
3 that might be a problem meeting all of that in 90 days.

4 THE COURT: You are in more than several cases.

5 MR. CHERRY: We are in several. Thank you.

6 THE COURT: Okay. Absolutely. If you can agree on
7 a different date or you need more time and you agree, that's
8 fine.

9 Okay. We did the next two. And, again, if there
10 is any other protocols that need to be developed as these
11 come in that you can't use the others, please see Mr. Esshaki
12 about doing that.

13 I have -- okay. The next settlement conference is
14 May 6th, and we will keep that date. Then I was thinking for
15 the next conference September 16th. Does anybody have any
16 known conflicts for that period?

17 (No response.)

18 THE COURT: We will set May 6th and we will set
19 September 16th. On May 6th I'm not sure what motions to
20 dismiss, I will have to look at that, will we be looking at.
21 We talked about the extended dates for a couple of those so
22 we will do those. If there's any other motions that come in,
23 you know, all I ask, regardless of what they are on, is that
24 you give us some time before May 6th to prepare for them but
25 I think we have the list, and then we will look at the next

1 group that will come in for September 16th, okay, and have a
2 schedule on those.

3 MR. HANSEL: Excuse me, Your Honor. Greg Hansel
4 for direct purchasers.

5 What time on the 16th?

6 THE COURT: Well, we will do it at 10:00, the same
7 as we do now.

8 We need a briefing schedule for the
9 direct-purchaser plaintiffs' motions for leave to amend the
10 consolidated complaint or has that been -- that was filed on
11 1/26/15.

12 MR. HOESE: Your Honor, William Hoese again for the
13 direct purchasers.

14 This has been consented to by Denso and Mitsuba, I
15 think, according to what Mr. Cherry has told me.

16 MR. CHERRY: Yes.

17 MR. HOESE: So unless Your Honor deems it
18 necessary, we were just going to file it as a consented to --

19 THE COURT: No, that's great, I just had a note to
20 take care of.

21 MR. HOESE: Thank you, Your Honor.

22 THE COURT: All right. Is there any other matter
23 anyone has before we proceed to the motions?

24 (No response.)

25 THE COURT: No. Okay. We will go into motions.

1 We will take a ten-minute break and then resume on motions.

2 Thank you.

3 THE LAW CLERK: All rise. Court is in recess.

4 (Court recessed at 11:06 a.m.)

5 — — —

6 (Court reconvened at 11:21 a.m.; Court, Counsel and
7 all parties present.)

8 THE LAW CLERK: All rise. Court is back in
9 session. You may be seated.

10 THE COURT: Mr. Spector?

11 MS. SPECTOR: Your Honor, Gene Spector again.

12 I would like to ask the Court if we can change the
13 date for the status conference in September from the 16th to
14 the week before, to the 9th if possible, because of the
15 Jewish high holidays on the 14th, 15th and then again on the
16 22nd?

17 THE COURT: Okay. Let me just take a look. I can
18 do it on the 9th, that is -- Labor Day weekend would have
19 been the 7th, I don't know if that means anything to anybody,
20 but if you agree on the 9th, we can do it the 9th -- no, the
21 2nd is before Labor Day.

22 MR. SPECTOR: The 9th is fine, Your Honor,
23 apparently.

24 MR. TUBACH: The 2nd, Your Honor.

25 THE COURT: Pardon me? The 9th is not good for

1 defendants, is that what we are saying?

2 MR. MAJORIS: No, it's good.

3 THE COURT: It's good. Okay.

4 MR. SPECTOR: Thank you.

5 THE COURT: We will do it the 9th. Thank you. For
6 motions -- I'm sorry, Chris, was that motor generators that
7 you wanted to take first?

8 THE LAW CLERK: Yes, that's the one they wanted to
9 do.

10 THE COURT: Just give me a minute to clear up here.
11 All right. This is defendants' joint motion to dismiss the
12 end payers consolidated class action. Mr. Cherry?

13 MR. CHERRY: As to motor generators, yes, Your
14 Honor. Thank you.

15 So this morning we've spoken with the plaintiffs
16 and I believe have reached an agreement.

17 MR. SELTZER: Yes.

18 MR. CHERRY: So for the end payers I understand --
19 we have pointed out, I guess, that they were 38 in our
20 initial motion, we have determined now it is 41 of the 58 end
21 payers who we know did not purchase hybrids and there are
22 some that's unknown still, but I think what we have agreed to
23 stipulate that end payers would dismiss those who didn't buy
24 hybrids, those 41 from the case without prejudice, and we
25 will -- and they will inform us let's say within 30 days of

1 the others when they have determined those unknowns whether
2 they bought hybrids or not and if they didn't they would be
3 dismissed as well.

4 MR. SELTZER: Yes, Your Honor, Mark Seltzer for the
5 end payers.

6 What we have agreed to is that we will prepare a
7 stipulation and proposed order which will dismiss those end
8 payer named plaintiffs who did not buy a hybrid car or lease
9 a hybrid car or purchase or lease an electric car. We will
10 verify the identity of those plaintiffs and that will be part
11 of the stipulation. The case will proceed as to the ten
12 plaintiffs who are conceded to have purchased hybrid cars and
13 who have standing to pursue the case.

14 MR. CHERRY: Actually as to that, Your Honor, we do
15 have an argument -- a Twombly argument as to the other ten, I
16 guess, who did purchase hybrids which we fully briefed. We
17 don't believe further argument is necessary on that, but we
18 don't agree that those should not be dismissed, but I think
19 that's along the lines of some of the arguments that you have
20 already heard, Your Honor.

21 THE COURT: So you're maintaining your Twombly
22 argument as to the ten, it doesn't really make any
23 difference?

24 MR. CHERRY: Yes, and the point there is really
25 from our perspective the claim rests on a single plea as to a

1 single RFQ involving GM for cars that haven't gone to market
2 yet, and the ten here bought Priuses and two bought a Camry,
3 and we just see a disconnect there but we don't think there
4 is argument necessary beyond that.

5 THE COURT: The Court will do an opinion on that.

6 MR. SELTZER: We are submitting on the papers too
7 but I would invite the Court's attention to the Hitachi plea
8 agreement, particularly paragraphs 2, 4-A and 4-B regarding
9 the scope of conspiracy.

10 THE COURT: All right.

11 MR. SELTZER: Thank you.

12 THE COURT: Thank you.

13 MR. CHERRY: Your Honor --

14 THE COURT: You know, I was going to come to that
15 same conclusion.

16 MR. CHERRY: Your Honor, as to the auto dealers, we
17 have also spoken about working out a stipulation that would
18 accomplish approximately the same thing with respect to the
19 auto dealers to determine which of these dealerships actually
20 bought hybrids and which didn't and where a dealer has
21 multiple brands which -- for which ones did they actually buy
22 a hybrid and which they didn't. And I think we would like to
23 try to work out within let's say 30 days some resolution of
24 that and then stipulate to a dismissal without prejudice as
25 to those who did not buy a hybrid and for brands for which

1 they did not buy a hybrid so we know what's left in the case.

2 THE COURT: Okay.

3 MR. CHERRY: Thank you.

4 THE COURT: Ms. Romanenko?

5 MS. ROMANENKO: Your Honor, we are happy to enter
6 into a stipulation with the defendants with regard to motor
7 generators concerning just the standing of the dealerships to
8 bring motor generator claims, and we are hopeful that
9 defendants will withdraw that portion of their motion. We do
10 want to state for the record that we investigated the claims
11 of those dealers who are listed in the motor generators
12 complaint or who are bringing motor generator claims and we
13 believe, and we named them, that they each had a good-faith
14 basis to proceed in this case. However, if the defendants
15 can demonstrate to us that some of them should be removed we
16 are happy to negotiate with them on that basis.

17 And Your Honor notes there is another motion coming
18 up on inverters where we believe defendants will raise the
19 same issue. We hope that the issue about whether certain
20 plaintiffs are able to bring these claims based on purchases
21 of hybrid or electric vehicles is not going come up again in
22 the inverters' motion given the resolution we discussed in
23 motor generators. If defendants want to meet and confer with
24 us on that issue before they file their motion that's
25 certainly fine but we don't see a need to engage in any

1 further briefing or oral argument on that particular issue.

2 THE COURT: Okay. Mr. Cherry?

3 MR. CHERRY: Yes, Your Honor. I think we have
4 pointed out at least one auto dealer who did not -- certainly
5 did not buy any hybrids and they have agreed that was
6 inadvertently part of the complaint, and we believe there are
7 a fair number who assert claims on behalf of certain brands
8 that we pointed out didn't sell hybrids, so I expect we
9 should be able to come to resolution on this.

10 THE COURT: So you are going to work that out with
11 the information that you have and have in the case only those
12 dealers that, in fact, purchased hybrids?

13 MR. CHERRY: And as to the brand for which they
14 purchased hybrids.

15 THE COURT: And the brand. Okay.

16 MR. CHERRY: Thank you.

17 THE COURT: Thank you. And the public entities
18 argument?

19 MR. CAROME: Good morning, Your Honor. My name is
20 Patrick Carome. I'm with the law firm of Wilmer Hale. We
21 are counsel for Denso. I'm going to be arguing the
22 collective motion to dismiss in the public entity wire
23 harness case.

24 THE COURT: Okay.

25 MR. CAROME: This motion is unlike any that this

1 Court has considered to date in these MDL proceedings. In
2 this case five local governments from four states represented
3 solely by private counsel seek injunctive relief on behalf of
4 every local government in the entire country, and they also
5 are seeking to assert damage claims on behalf of every local
6 government in 17 states and on behalf of every state level
7 government entity in 9 of those 17 states.

8 THE COURT: So I wasn't quite clear, so this local
9 unit -- one of these named local units is going to represent
10 for the damages part the state?

11 MR. CAROME: That's correct and, in fact, there is
12 an interesting hodgepodge. I mean, for example, the original
13 lead plaintiff in this case, the City of Richmond from
14 California, is purporting to represent eight other states but
15 not its own State of California. It is a bit of a mystery to
16 us how we got this hodgepodge of claims, they are not
17 bringing -- they are only choosing damages claims on behalf
18 of 17 states, not all of the Illinois Brick repeller states,
19 so there is an interesting hodgepodge of claims being made
20 here by solely private lawyers.

21 THE COURT: These states did not join Florida in
22 the Florida case?

23 MR. CAROME: That's exactly right, Your Honor.

24 THE COURT: And we have no attorney general or
25 anybody like that?

1 MR. CAROME: That's exactly right, even though it
2 is nearly a year since City of Richmond filed this action,
3 not a single government lawyer for any member of the punitive
4 class or even any of the five local governments that purport
5 to be named plaintiffs have appeared in this case or have
6 stepped forward to give any indication whatsoever that it is
7 okay that this broad government entities proceeding is going
8 on on their behalf.

9 THE COURT: Now we have 11th Amendment issues as to
10 the state?

11 MR. CAROME: That's correct, I have a chart which I
12 have given to your law clerk and I think we are going to put
13 up on the screen to sort of lay out the arguments, but before
14 I get there a lot is riding on this motion, Your Honor, and
15 on this Court's willingness to decide this motion now rather
16 than letting this case proceed on behalf of a massive complex
17 class of governments. This is especially so because
18 governments are very different from private litigants.

19 Four months ago in the In Re: Lithium Ion Batteries
20 antitrust litigation, another federal district judge
21 dismissed at the threshold a similarly massive punitive class
22 action on behalf of government entities from across the
23 country. That court ruled that the sensitive issues that may
24 arise in the context of government plaintiffs and the
25 prospect of massive discovery concerning a class comprised of

1 municipal and regional governments across the nation made
2 immediate dismissal of the case both appropriate and
3 necessary. That result should also be the same here.

4 Referring to the chart, I have laid out -- this
5 chart sort of explains the scope of each of the three basic
6 arguments that the defendants are making here. On the
7 left-hand in the blue column this just reflects the damages
8 class. The blue column is the states for which the
9 plaintiffs are purporting to assert state law damages claims.
10 The next column relates to our -- the 11th Amendment issue,
11 those are the -- that second column, the highlight of red
12 with respect to each of those states, those are the nine
13 states that they purport to be bringing claims on behalf of
14 the states and every state level entity, every state
15 university, every state agency, those are all immune entities
16 and we assert dismissal is necessary as to all of those
17 entities based on the 11th Amendment.

18 Then the next column relates to our argument that
19 all of these states -- this applies to all of the 17 states,
20 each of those jurisdictions has laws that specify that only
21 official government counsel for government entities there in
22 general can represent those government entities. Some allow
23 there to be special circumstances where private counsel can
24 step in in lieu of or in assistance to those official
25 government counsel but there are special detailed procedures

1 for when that has happened and there has been no indication
2 of anything like that has happened.

3 THE COURT: You argue, yes, that there is no
4 indication that any of these representatives have filed on
5 behalf of their counsel, it is just this private counsel that
6 has filed on behalf of the state?

7 MR. CAROME: And then just previewing the last
8 argument is the third column, those are the states where they
9 are in red for which there is no named plaintiff from that
10 state, and we have a standing argument there which we think
11 goes well beyond the type of standing argument that this
12 Court has addressed before.

13 So if I may, let me first turn to the
14 11th Amendment sovereign immunity point. So under the
15 11th Amendment the state and their sovereign subunits may not
16 be subject to federal jurisdictional authority absent a clear
17 and affirmative advance consent and waiver of sovereign
18 immunity. Therefore to proceed on behalf of state entities
19 the plaintiffs here would have to show that each state entity
20 in the class has affirmatively authorized and consented to
21 this Court's jurisdiction. They have completely failed to do
22 that, and dismissal is therefore necessary.

23 The plaintiffs concede that the 11th Amendment
24 applies to efforts to include nonconsenting states on the
25 offensive side of the case, which is what is happening here,

1 and they also concede I believe that the 11th Amendment
2 applies to class members -- bringing class members into a
3 certified class. I think the only thing that they contest is
4 whether the 11th Amendment applies with respect to absent
5 class members before class certification.

6 Despite all of the bluster, plaintiffs have not
7 identified a single case in which any federal court has
8 permitted states to remain in a class action in the face of
9 an 11th Amendment challenge.

10 THE COURT: Even though they may be able to opt
11 out?

12 MR. CAROME: That's correct, Your Honor. The key
13 case on this point is the Walker vs. Liggett case, that's the
14 only case to address this issue, and it held that absent
15 states must be dismissed from a class action at the threshold
16 based on the 11th Amendment.

17 Now, while dismissal occurred in that Walker case
18 after there had been a preliminary certification of a class,
19 that happened at the very front end of that case, the court
20 was very clear that this was a matter of threshold
21 jurisdiction, and it used the device of 12(b)(1) -- a
22 12(b)(1) motion as the basis for dismissing from that case
23 all of the state entities that were purportedly included in
24 that case.

25 THE COURT: Even though in that case they did get

1 to class cert?

2 MR. CAROME: That was a strange case, Your Honor,
3 it was within a few days of the filing of that case, it was
4 sort of a pre-set-up class. There was an immediate --
5 without any motions practice or anything there was an
6 immediate filing of a settlement class and a proposed
7 settlement.

8 THE COURT: But the court decided this on the
9 12(b)?

10 MR. CAROME: The court decided it at the 12(b)(1)
11 stage, and it dismissed all of the states who were
12 purportedly within that class. Only a handful of the states,
13 not all of the states who were in that class came forward and
14 objected, but the court spelled out that all of the states
15 had to be dismissed at the threshold because the court simply
16 cannot assert jurisdiction with respect to nonconsenting
17 states.

18 THE COURT: And there was no state here -- as I
19 looked again at that complaint there is no state that is
20 named?

21 MR. CAROME: Amazingly, Your Honor, yes, we have a
22 village in New York and a county here and there and a city
23 here and there purporting to assert claims on behalf of
24 states, it is really an extraordinary thing.

25 So Walker rejected explicitly the argument that the

1 plaintiffs make here, which is somehow this whole
2 11th Amendment problem can be made to evaporate by an opt-out
3 proceeding. Walker said no, you cannot do it, an opt-out
4 proceeding would itself involve the court exercising
5 jurisdiction over states, and that cannot -- that cannot
6 happen.

7 Walker's ruling has been cited favorably by other
8 courts, including the McKesson and Sobel cases, and there are
9 no -- there's no case in which Walker has ever been
10 criticized.

11 So the plaintiffs' main response to the
12 11th Amendment problem here doesn't go to the substance of
13 the problem, it goes -- they argue that the issue is not
14 justiciable, that somehow we, the defendants in this case,
15 don't have standing to raise the issue, and that just doesn't
16 work. The 11th Amendment issue is a jurisdictional issue, it
17 is jurisdictional in nature, and for that reason the
18 6th Circuit has stated repeatedly that even if no party
19 raises the issue courts can and should, should, that's a
20 quote from multiple 6th Circuit cases, including the Nair
21 case, should raise the 11th Amendment sua sponte to avoid
22 subjecting nonconsenting states to the jurisdiction of a
23 federal court.

24 Courts always have jurisdiction to determine their
25 own jurisdiction, that's one of the most basic things that

1 courts have to do, and questions of standing and they also
2 argue ripeness are simply inapplicable to these kinds of
3 threshold issues.

4 Plaintiffs also argue as we noted that -- their
5 other main argument is as well, yeah, there may be an
6 11th Amendment problem but we are going to solve it without
7 opt-outs. I have already pretty much addressed that, but an
8 opt-out procedure by definition would either compel each of
9 these sovereign states and all of their state universities
10 and different state-level agencies in the class they would
11 have to come before this Court to request exclusion, and if
12 they didn't then they would be bound by the results of the
13 litigation without ever having consented to it, and Walker
14 said that it is simply inappropriate to require any state to
15 opt out because that would suggest the court claims
16 jurisdiction over the states which it cannot do.

17 Plaintiffs also seem to suggest that well, maybe
18 there can be some sort of special sets of notice here where
19 we can let states give them notice and let them come forward
20 and join the class if they want to. The problem with that is
21 that Rule 23 has been held time and time again not to permit
22 opt-in classes, and that would be a classic opt-in situation,
23 and that doesn't -- that doesn't solve the problem.

24 Plaintiffs -- you know, I don't think we need to go
25 here but the plaintiffs also suggest well, the states aren't

1 going to be bothered at all if we just kick the can down the
2 road on --

3 THE COURT: They claim there is no harm until they
4 have the opportunity to opt out?

5 MR. CAROME: Yes, and that's wrong at two levels.
6 One, the court's exercising -- or purporting to exercise
7 jurisdiction over them itself is the very harm that the
8 11th Amendment --

9 THE COURT: Even though they don't know about it?

10 MR. CAROME: Even though they don't know about it
11 and especially because they don't know about it, especially
12 because they don't know about it. And in addition, you know,
13 there is -- they will also -- to pick one thing that is
14 clear, if the states and the agencies are not dismissed at
15 the threshold we will have to immediately start taking
16 discovery from some of those entities. As the Court noted,
17 states, you know, are a world of difference from the Village
18 of Northport, New York, and we'll have to be engaged in lots
19 of discovery as to how do they buy their cars, how do they
20 buy their fleets of cars, all kinds of issues to figure how
21 can the Village of Northport and the City of Richmond even
22 represent them. We -- I think we can be fairly confident
23 that those states are not going to be very happy and it is
24 going to actually present an immediate 11th Amendment issue
25 if we begin --

1 THE COURT: Slow down, slow down.

2 MR. CAROME: -- if we begin serving them with
3 discovery requests.

4 This is not an issue -- the law on this issue is
5 clear, there is nothing more to be developed between now and
6 some further states.

7 THE COURT: Well, it would be interesting to see
8 how our little vacation spot of Traverse City can represent
9 17 states.

10 MR. CAROME: It is quite curious, it is quite
11 curious. It is nine states because they have this
12 hodgepodge, we don't know why they have chosen the nine, no
13 rhyme or reason to it that they have been willing to explain
14 to us. So that's the 11th Amendment arguments.

15 Let me turn now to the government attorneys'
16 statute problem. So as we have laid out in our brief, under
17 state law applicable to all of the jurisdictions included in
18 the damages class and absent exceptional circumstance and
19 special government approvals, state and local governments
20 generally may be represented in court only by their official
21 government lawyers such as the attorneys general, county
22 attorneys, city attorneys. This is a big problem for these
23 public entities here who are represented solely by private
24 counsel, and it is a problem just as much for the named
25 plaintiffs as it is for the absent ones.

1 Now let me just give you an example of what these
2 laws are like. We have given you a full appendix in our
3 briefs of examples -- of the laws in these jurisdictions but
4 at the state level here is New York's executive law 63(1),
5 the attorney general shall prosecute and defend all actions
6 and proceedings in which the state is interested. The other
7 state statutes are discussed in our memorandum at pages 14
8 and 15 and, as I said, they are in the appendix.

9 At the local level, just an example, the charter
10 for the Michigan cities of Alpena, Cheboygan, Buchanan and
11 Hillside all provide as follows, I quote, the city attorney
12 shall conduct for the city all cases in all courts and before
13 all legally-constituted tribunals whenever the city is a
14 party thereto.

15 So this is -- and the plaintiffs admit that these
16 laws are ubiquitous. They don't contend that these are -- we
17 have just picked out a handful, they concede that these laws
18 are ubiquitous. Every published case that has addressed the
19 impact of these types of government attorneys' laws on class
20 actions brought on behalf of government entities has held
21 that these laws preclude class actions on behalf of
22 government entities when they are attempting to be
23 represented by private counsel.

24 THE COURT: Do we know or have any indication of
25 any delegation of this authority by counsel for the cities or

1 the states to private counsel?

2 MR. CAROME: We asked that even as to the five
3 named plaintiffs here, Your Honor, we asked it in repeated
4 meet and confer sessions and we even went so far as to write
5 a letter before we filed our motion, it is in -- actually
6 those are appendix B and C of our brief are the letters on
7 this. We asked even to the five named plaintiffs, how is it
8 that you, represented by the plaintiffs, have the authority
9 to proceed just on these five named plaintiffs? They refused
10 to give us any answer to that question at all, and that's
11 just the five named plaintiffs, we have thousands and
12 thousands of government entities around these 17 states.

13 THE COURT: So they argue that a named attorney on
14 any pleading -- we don't question whether they have the
15 authority by the plaintiff?

16 MR. CAROME: That's the difference between private
17 litigants and government entities, Your Honor. Government
18 entities are a special kind of litigant and they, unlike
19 private plaintiffs, have state laws that specify how they can
20 proceed, and this -- they are different and they must -- they
21 must do this.

22 Now, as I said just -- I said every published case
23 that has considered this has gone our way, and just so the
24 Court has those, those are -- the key cases on this are the
25 Walker case, which ruled on this alternative ground in

1 dismissing the states in that case, the Ackel case from the
2 5th Circuit, and the Dallas County vs. MERS Corp. case.

3 There is also a case that plaintiffs brought to the
4 Court's attention from Nevada, Southwest Gas, relying on the
5 Nevada government attorney statute to dismiss class actions
6 on behalf of all Nevada counties, so the case law actually
7 goes really one way on this issue.

8 Now, they try to argue that a couple of cases from
9 states don't -- you know, have sanctioned this kind of
10 private representation but, in fact, they are wrong about
11 that too. They point to a case from the California Supreme
12 Court called County of Stanislaus, and that Court -- that
13 case, the Stanislaus case, did not involve any representation
14 of a government entity by a private counsel. In that case
15 the counsel for the named plaintiff, the County of
16 Stanislaus, was represented by its official county counsel.
17 And the issue in this case actually that was decided and
18 presented to the California Supreme Court involved could it
19 be the county counsel for the County of Stanislaus or the
20 state attorneys general -- the state attorney general that
21 could litigate that antitrust claim in California.

22 The issue of the government attorney statute was
23 not presented at all or decided at all in the California
24 Supreme Court, there was some consideration of that issue in
25 the California Intermediate -- this Court, which plaintiffs

1 have improperly cited in their brief, that case was
2 depublished by the California Supreme Court and it is
3 impermissible at least as a matter of California law even to
4 cite that case, and so there is no decision in California
5 remotely suggesting that private counsel can represent
6 government entities.

7 They also refer to some Texas state cases. Texas
8 is not one of the states at issue here, but they point out
9 that there have been some class actions that have gone
10 forward on behalf of counties -- or actually cities in Texas.
11 The issue of the government attorney statute was not actually
12 at issue in those cases so they don't even stand for it. And
13 the 5th Circuit in Ackel has made clear that this is a
14 question of Rule 23, and you can't -- you can't -- what Ackel
15 says is you can't do a class action in this fashion without
16 making it an opt-in class contrary to Rule 23 because each
17 and every jurisdiction would have to go through a process to
18 authorize -- both for the named plaintiff and for the absent
19 plaintiffs to authorize representation by private counsel and
20 obviously we haven't even begun -- there is no way that can
21 happen in a massive nationwide effort such as this.

22 So again the plaintiffs' main argument here is to
23 sort of dodge these statutes and say well, those statutes are
24 overridden here by Rule 23 and Shady Grove -- the Supreme
25 Court's decision in Shady Grove Orthopedics vs. Allstate, and

1 that's their main argument as to how to get around these
2 government attorney statutes, and they are wrong on that
3 score on multiple scores as well.

4 Most fundamentally when that Shady Grove issue
5 comes up when there is a conflict between the state laws that
6 you are talking about and the federal rule, and here there is
7 no conflict except in sort of the way -- sort of the
8 consequence to how these laws end up playing out, but the
9 government attorneys' laws don't have anything to do with
10 class actions and the criteria for when a class action can
11 proceed, they concern the structure of state government, how
12 states and their political subdivisions may act and which
13 officials can control that action. Rule 23 obviously deals
14 with when is a class action appropriate.

15 These are completely different laws that go in
16 completely different directions, address completely different
17 topics. There is not a conflict, there is just a problem, it
18 wouldn't be just a class action even if the City of Richmond
19 was bringing this case just on its own behalf without -- as a
20 class action it would still have to comply with this law and
21 get around this problem. But even if there were a conflict
22 between Rule 23 and the government attorneys' laws, the test
23 for resolving that conflict would actually not be the Shady
24 Grove test, rather it be the much more stringent -- or more
25 stringent, I think Shady Grove is a stringent test as well,

1 but it would be the more stringent plain statement test that
2 the Supreme Court has prescribed for determining whether a
3 federal law may be interpreted to override a state law
4 concerning core attributes of state sovereignty.

5 The Supreme Court has made clear that when it comes
6 to matters of state prerogative federal law does not abrogate
7 the state law unless Congress makes it -- makes its
8 intention, I'm quoting it, makes its intention unmistakably
9 clear in the language of the statute, that's the Will vs.
10 Michigan Department of State Police case from the Supreme
11 Court.

12 Government attorneys' laws are within this special
13 sovereign sphere as the Supreme Court has said through, and
14 I'm quoting, through the structure of its government and the
15 character of those who exercise government authority, a state
16 defines itself as a sovereign. That's the Gregory vs.
17 Ashcroft case.

18 So applying the plain-statement test to this
19 alleged conflict between the state attorneys' laws and
20 Rule 23 makes clear that Rule 23 or the Rules Enabling Act
21 does not displace these state government attorneys' laws
22 because nothing in either of the Rules Enabling Act or
23 Rule 23 makes it, quote, unmistakably clear, close quote,
24 that a federal rule of civil procedure can override a state
25 sovereign determination regarding who may represent the state

1 and its subdivisions. In fact, the Rules Enabling Act does
2 just the opposite, it says that the rules promulgated
3 pursuant to the Rules Enabling Act cannot, quote, abridge or
4 modify any substantive right, that's the opposite of a plain
5 statement that Congress intended for these rules to abrogate
6 something as fundamental as the state's laws regarding how
7 its government is organized.

8 THE COURT: What would it abrogate though even
9 if -- I mean, Rule 23 --

10 MR. CAROME: I would say, Your Honor --

11 THE COURT: It doesn't seem to have much connection
12 with the attorneys -- the government attorneys law.

13 MR. CAROME: Go back to that New York statute, the
14 attorney general shall prosecute and defend all actions or
15 proceedings in which the state is interested. Here there is
16 no doubt that the State of New York is an -- interested in
17 this case, and there is no doubt that the state attorney
18 general is not going to be representing the State of New York
19 and the universities of New York and all of those agencies if
20 the case proceeds as the plaintiffs want it to proceed. I
21 think it is direct abrogation.

22 So that's -- we think that this conflict if it
23 exists would have to be resolved under this plain-statement
24 rule and that clearly the state laws prevail under that even
25 if just -- I won't go into this in too much detail, but even

1 if you went to the Shady Grove test for trying to reconcile
2 this alleged conflict between state law and federal rules,
3 which we don't believe exist, but even if you went there
4 there are two prongs to the Shady Grove test. The first is
5 do the federal rules and the state laws answer the same
6 question? And courts have made clear that in answering -- in
7 assessing that issue, do the laws and the rule address the
8 same question, you look at the face of the state laws and the
9 face of the rule. And here, you know, perhaps I've already
10 addressed it, it couldn't be clearer I would say that the
11 state government attorneys' laws and Rule 23 don't remotely
12 address the same question, they are addressed at two
13 completely different matters, and that just ends the inquiry
14 at that point and state law prevails.

15 Even if you had to get to prong two, prong two
16 would permit Rule 23 to trump the government attorneys' laws
17 only if such application did not abridge or modify any
18 substantive right under state law, and it absolutely would,
19 we submit. Plainly the government attorneys law define as
20 substantive state right, i.e., the state's right to delegate
21 to particular public officials the responsibility for
22 representing the state or its divisions -- political
23 subdivisions in court.

24 This Court -- Your Honor's ruling in June and
25 July -- this didn't involve government entities but I think

1 that your own decision in the wire harness and fuel senders
2 cases regarding the Illinois statute which says that class
3 actions in Illinois under the Illinois antitrust laws may
4 only be pursued by the attorney general, this Court found
5 that that law was not trumped by Rule 23, and really the same
6 analysis I would submit applies here. These government
7 attorneys' laws are not part of the states' procedural laws
8 and they clearly address matters of important policy and
9 sovereign right of the states.

10 THE COURT: All right. What about your third issue
11 here?

12 MR. CAROME: Turning to the third issue, just as
13 you can see from the chart there's no named plaintiff from 13
14 out of the 17 states under the laws the plaintiffs are suing,
15 and we submit for this reason all claims brought under the
16 state laws other than California, Michigan, New York and
17 North Carolina should be dismissed.

18 Now, there are critical differences between this
19 public entity's case and the other auto parts cases in which
20 Your Honor has ruled that this standing -- this type of
21 standing question should be addressed later. The first of
22 those few differences is there's an extreme disconnect here
23 between the named plaintiffs and the states that are covered
24 by their punitive class. I mean, in prior cases that Your
25 Honor considered there was only one or a couple of states

1 that were without representation by the named plaintiffs.
2 Here the entire size and shape of this case would be
3 fundamentally altered and the burden of litigation would be
4 greatly increased by permitting this case to proceed on
5 behalf of government entities in 17 states rather than four.

6 The second big difference between this case and the
7 prior decisions by this Court on standing matters is that
8 there is a big difference, as I said before, between
9 government entities and private plaintiffs but it is quite
10 specific here. Private plaintiffs move from state to state,
11 they are free to do so and as we know people move around
12 during their lives and so it is at least conceivable that
13 private plaintiffs -- end payer plaintiffs may have made a
14 purchase in the state that is different from which they now
15 live or that they went and purchased a car outside of their
16 own home state. Government entities are quite different. By
17 definition government entities don't move around the country,
18 they stay in one place, and they also have special reasons
19 and sometimes even laws to buy products like automobiles for
20 their use within their own borders at home.

21 So this Court indicated in the hearings part case
22 that the inability of a nonresident of a state to bring a
23 claim under that state's laws is certainly a consideration,
24 and I would say even a basis, for dismissing for lack of
25 standing where there is no instate plaintiff for that, and so

1 I think that the Court has already set itself on a path
2 towards dismissing in this situation.

3 THE COURT: Let me back up. There really are no
4 named states here, there are municipalities -- I keep asking
5 this question but the way the argument goes I get confused
6 again. There are --

7 MR. CAROME: We have one village, two cities and
8 two counties.

9 THE COURT: Within these states while --

10 MR. CAROME: Those five named plaintiffs come from
11 four states.

12 THE COURT: But they have not named those states, I
13 mean, they are not a named plaintiff?

14 MR. CAROME: There is no state or state level
15 agency, we don't have the University of California, City of
16 New York, et cetera, none of those -- we don't have a state
17 entity at all.

18 THE COURT: Okay. I just want to get that clear
19 because by the argument I'm getting a little confused as
20 to --

21 MR. CAROME: So we think that it is important,
22 because of the differences I pointed to it makes a lot of
23 sense for this Court not to kick the can down the road on the
24 standing question; to allow the case to proceed here would be
25 really extraordinary I think.

1 So lastly, in the later part of the briefing we
2 cited a number of specific statutes, Maryland, Nevada, West
3 Virginia, Iowa and Nebraska, which all make it very clear we
4 submit that a government that under -- for example, under
5 Maryland's law only the State of Maryland itself or one of
6 its political subdivisions could bring an action under
7 Maryland law -- Maryland's antitrust law. Maryland's
8 antitrust law does not allow a California government entity
9 to sue under the Maryland law. And I think that's probably
10 true for all of these state laws but specifically for
11 Maryland, Nevada, West Virginia, Iowa and Nebraska, that's
12 very clear on the face of the statute, that's just another
13 reason why there is a massive standing problem here.

14 THE COURT: Okay. Thank you.

15 MR. CAROME: Thank you.

16 THE COURT: Let's hear what plaintiff has to say.

17 MR. NOBLIN: It is barely but good afternoon, Your
18 Honor.

19 THE COURT: Good afternoon.

20 MR. NOBLIN: I'm Rob Noblin of Green & Noblin for
21 the public-entity plaintiffs.

22 Defense counsel stated more than once --

23 THE COURT: How do you spell your last name?

24 MR. NOBLIN: N-O-B-L-I-N.

25 THE COURT: Thank you.

1 MR. NOBLIN: Sure. Defense stated more than once,
2 I wrote this down, government is different than private
3 litigants, and he said I think that was a big difference but
4 in this context that's actually not true.

5 THE COURT: How is that?

6 MR. NOBLIN: The reason we know that is a U.S.
7 Supreme Court case interpreting the federal antitrust law and
8 the County of Stanislaus case interpreting the California
9 Cartwright Act. Each of those cases drew a distinction when
10 you are talking about a government plaintiff in an antitrust
11 action, and on one side of the distinction is when the
12 government is exercising sovereign or quasi sovereign powers,
13 in other words, prosecuting for criminal antitrust violations
14 or seeking to impose civil penalties for those violations.

15 On the other side of the distinction is when a
16 government entity is suing for injury to its business or
17 property. On that side of the distinction government
18 entities are simply another consumer. As the County of
19 Stanislaus case --

20 THE COURT: But when you read the laws of those
21 states regarding counsel representing them it sounds like
22 they require their own attorneys to represent them even when
23 they are claiming injuries to themselves?

24 MR. NOBLIN: Well, those statutes talk about -- for
25 example, counsel quoted some Michigan municipal statutes that

1 said the city attorney must represent the city when the city
2 is, quote, a party thereto, close quote. The absent class
3 members here are not parties. The law is clear on that that
4 they are not parties and therefore those statutes don't apply
5 on their face. They aren't retaining us, just like in a
6 consumer class you would not --

7 THE COURT: But who is retaining you, you have got
8 four municipalities -- four or five, I forgot?

9 MR. NOBLIN: We have five.

10 THE COURT: You're claiming -- five municipalities
11 and you're claiming that they represent states, the
12 municipality, the little city represents the state?

13 MR. NOBLIN: We maintain that they are named
14 representatives of all the absent class members, the nine
15 states we are talking about, I should emphasize out of this
16 class the states are nine, that they represent all of the
17 members of the class. Now, as to their adequacy to do so
18 that's an issue for class certification but that's a far cry
19 from saying that these statutes prevent anyone from
20 representing government entities as absent class members,
21 something that has not been held by any of these states
22 themselves.

23 Now, as we are -- when we are trying to apply state
24 statutes the job here is to predict how the Supreme Court of
25 that state would apply the statute.

1 THE COURT: So let me -- I have to stick with these
2 municipalities. So you have authority from these
3 municipalities to sue on their behalf?

4 MR. NOBLIN: Yes, Your Honor. So the -- but if I
5 could return to that point about that the government here
6 when they are acting this way they are acting like consumers?
7 County of Stanislaus said, quote, counties that have been
8 injured by price fixing are no different than other persons
9 or businesses that have been injured by such conduct, close
10 quote. The court went on to make that clear that that
11 includes the power to bring a class action in federal court
12 based on the state antitrust law.

13 THE COURT: That's the County of Stanislaus?

14 MR. NOBLIN: Yes, Pacific Gas and Electric vs.
15 County of Stanislaus, and the quote I read appears at
16 947 Pacific 2nd at 300.

17 So when we come to that point that Your Honor
18 raised about representing -- these class members representing
19 states and others, the absent class members, as I said,
20 aren't parties therefore the statutes that say who can
21 represent a city or county as a party are inapplicable. Here
22 the absent class members, just as in all the consumer
23 classes, they are protected by the court and the named
24 plaintiffs, and then through class certification the various
25 obligations to the class as a whole but class actions would

1 be impossible if somebody had to run around and retain all
2 the individual members of the class, that's one reason why we
3 have class actions.

4 The other point is that the purposes of these
5 statutes about retaining private counsel would not be
6 furthered by applying them here. The cases we cite in our
7 papers make clear there are two purposes behind these
8 statutes. One is to control who exercises the sovereign
9 power of the government, but as the Hawaii case and the
10 County of Stanislaus I just referred to you indicate, here we
11 are not talking about an exercise of sovereign power, here we
12 are talking about a government who suffered damage to its
13 business or property by buying something just like consumers,
14 so in this context they should be treated like consumers.

15 The other rationale for these statutes is to
16 protect the public fisc to prevent unwarranted expenditures
17 of public funds, but that rationale clearly doesn't apply
18 hereto because the absent class members are not going to have
19 to pay the attorneys' fees and litigation costs and, indeed,
20 if things go well the public fisc will receive revenue, not
21 an expenditure from this.

22 Turning to the 11th Amendment point, we think the
23 standing situation is very different here from the
24 6th Circuit cases as cited by defendants because in those
25 cases the state was a named defendant, and so the state can

1 raise the issue itself or the court could sua sponte say to
2 the state is there any realistic prospect the state would
3 want to be a defendant here.

4 We are in a much more unusual situation where the
5 state here is an absent class member of a plaintiff class,
6 and in that context the state may well want to waive its
7 11th Amendment rights, there are benefits to doing so in
8 terms of perhaps being able to recover for alleged harm
9 through the usual class process. The 11th Amendment entitles
10 the state to make that choice, not the defendants, because
11 the state is going to weigh the benefits and costs of
12 allowing this to go forward. The defendants, their only
13 incentive is to get the state out of court, so they can't
14 possibly fairly weigh the competing considerations the state
15 would.

16 THE COURT: But the state would be in the class
17 until it opts out?

18 MR. NOBLIN: Well, that's true for everybody. I
19 mean, until the class is certified there is nothing for them
20 to do --

21 THE COURT: Right, but isn't their sovereign
22 immunity impinged by automatically being a member of the
23 class until such time as they opt out?

24 MR. NOBLIN: I don't believe so. They are -- there
25 is no binding consequence that happens to them until they

1 have to decide whether to be in or out of the class. As for
2 any precertification discovery, it is the rule in this
3 circuit that there would have to be a particularized showing
4 approved by the Court for such discovery and that since they
5 aren't parties that discovery should be conducted as -- by
6 way of witness discovery and it's long been held that the
7 11th Amendment does not preclude states, just like every
8 other witness, from having to comply with witness discovery.

9 THE COURT: Okay.

10 MR. NOBLIN: The cases relied upon by defendants --
11 well, some just don't get as far as they want. The
12 defendants cite the Ackel case but in Ackel the plaintiff
13 conceded all the big points that we're arguing here including
14 Shady Grove and the applicability of the statute, they
15 conceded that they would have had to get retention agreements
16 for every absent class member, we certainly do not.

17 In the Walker case, which is only really on the
18 11th Amendment, they -- Walker did not even try to construe
19 Rule 23 in a Constitutionally permissible manner, which is
20 its obligation, and then referred to those 11th Amendment
21 cases that really say it is a matter of consent, is the state
22 consenting to the jurisdiction, and what do you need to
23 establish that consent. We believe that Rule 23 opt out is
24 sufficient in that the state's probably in a lot better
25 position to respond to one of those than is a typical

1 consumer.

2 THE COURT: Well, you're talking about assuming the
3 class is certified notifying every state, municipality,
4 governmental entity all over and if they don't opt out of
5 course they are in the class for which they may not have
6 waived -- they may simply ignore it like we all ignore a lot
7 of these notices for class actions, so here they are in the
8 class without any waiver or any of their own attorneys if
9 these laws apply coming in.

10 MR. NOBLIN: Well, first I would like to draw the
11 line between the nine states which have an 11th Amendment
12 argument and all the other local government entities --

13 THE COURT: Which do not.

14 MR. NOBLIN: -- which do not.

15 We are only talking about the nine states as to
16 waiver, and that's where we pointed out in our papers we
17 believe this is an issue more suited for certification, what
18 exact sort of notice do you want to give the states.

19 THE COURT: And why do we have only nine states,
20 why not all the states except for Florida of course?

21 MR. NOBLIN: We have various -- we looked at the
22 facts and the law of each one as we proceeded and through the
23 meet and confer process, and we believed that this was the
24 most appropriate plaintiff grouping for strategic purposes.

25 THE COURT: It must be very strategic because I

1 don't know -- I mean, certainly the states know about this
2 one would assume, we have got Florida in here and once one
3 attorney general files something we know just from past
4 actions that they all know about it.

5 MR. NOBLIN: We certainly know that a lot of states
6 are aware of the litigation, yes, Your Honor.

7 THE COURT: So you are just saying these states you
8 don't want to get in there but don't worry about it because
9 we will get you in there anyway? I'm having a hard time with
10 this concept.

11 MR. NOBLIN: We filed a complaint shortly before
12 that we believed was a possible statute-of-limitations state
13 but we thought would preserve the rights of some states but
14 if any state objected we certainly wouldn't go forward in
15 their name, you know, because we know that if they assert
16 that 11th Amendment right they wouldn't be here for long.

17 THE COURT: Or could they decide not to assert
18 their 11th Amendment right by not having their attorney
19 general file an action?

20 MR. NOBLIN: Well, now you are having to read the
21 tea leaves. There's are a lot of reasons why an attorney
22 general --

23 THE COURT: Well, I am --

24 MR. NOBLIN: -- wouldn't file an action besides the
25 11th Amendment.

1 THE COURT: I agree, I'm just trying to get over
2 this how you can as a municipality bring in all of these
3 states.

4 MR. NOBLIN: Well, all nine of the states we are in
5 the class but I don't want that part of the case to get
6 conflated with all the thousands of municipalities which
7 don't have an 11th Amendment right to assert.

8 THE COURT: Okay.

9 MR. NOBLIN: The Dallas County case really gave no
10 reasoning for extending these statutes to absent class
11 members, didn't mention Shady Grove at all, and distinguished
12 the City of San Benito in which the Texas Supreme Court said
13 sure, Texas local government entities can be in a class
14 action and the distinctions are completely unpersuasive as
15 far as distinguishing cities from counties and distinguishing
16 the Texas statute from Rule 23 when they are virtually
17 identical on the pertinent points.

18 The County of Stanislaus case that was derogated by
19 defense counsel we think is right on point because the issue
20 there was a particular county government official was
21 asserting a class action of all others similarly situated
22 including all the other California counties, so as to those
23 California counties they weren't being represented by their
24 own county counsel, and the court said that's not a problem
25 at all, the case should proceed.

1 If I could turn to Shady Grove because we think
2 that does govern here. When it comes to -- defendants say
3 that it doesn't because Rule 23 and the statutes answer
4 different questions, but that's clearly wrong and we know
5 that from Shady Grove itself where under prong one as it is
6 put, which we believe defendants have overstated, in Shady
7 Grove it was put this way, quote, we must first determine
8 whether Rule 23 answers the question in dispute, close quote.
9 And that -- and the Supreme Court said it did because
10 plaintiffs there just wanted to proceed under the rule, they
11 just wanted to establish typicality and numerosity and common
12 questions and proceed, and that's what we want to do. It is
13 defendants here as defendants did in Shady Grove that said
14 oh, no, there are these other provisions that keep you from
15 doing that. So prong one is clearly met.

16 And when you get to prong two we believe defense
17 counsel has just misunderstood the Shady Grove as far as what
18 it is saying about substance and procedure and how they
19 interrelate.

20 THE COURT: Well, let's stick with prong one a
21 minute which says that Rule 23 answers the question in --
22 must answer the question in dispute. What is the question in
23 dispute?

24 MR. NOBLIN: Can we proceed -- can our named
25 representatives proceed in a class action in representing

1 these absent class members? And we want to do so by meeting
2 the elements of Rule 23.

3 THE COURT: How does Rule 23 answer that question?

4 MR. NOBLIN: As they said in Shady Grove, it
5 provides the exclusive mechanism for proceeding on a class
6 action. If you meet its elements you may -- and it is the
7 plaintiff's option, you may proceed as a class action. Those
8 are all the elements we need to meet. Defendants are trying
9 to erect other hurdles to doing so.

10 THE COURT: Okay. Question two?

11 MR. NOBLIN: On prong two -- and I think it becomes
12 clear when you see prong two as well as how this should work,
13 both the plurality in Shady Grove and Justice Stevens were
14 completely in agreement that sometimes the federal rules will
15 override state substantive matters. That's not the question.
16 In fact, the Shady Grove plurality would say as long as the
17 federal rule is procedural it will trump the state provision
18 and since the Federal Rules of Civil Procedure almost all
19 proceed they are always going to trump.

20 As for requiring a plain statement of that, the
21 plain statement of that intent is in the Rules Enabling Act
22 itself and Shady Grove is the last word on the U.S. Supreme
23 Court interpretation of that statute, but we have to look at
24 Justice Stevens carefully because his vote turned the
25 plurality into a majority. And he wanted to create a narrow

1 exception going beyond the plurality, and his exception is if
2 a state is creating a cause of action it can define the
3 limits of that cause of action short of the federal rules and
4 the federal courts should respect that.

5 And we know that from the dialogue essentially
6 between Justice Stevens and the plurality on a case called
7 Sibbach v. Wilson decided a year after Erie in which it was a
8 state personal injury action in federal court on diversity
9 and the defendant wanted a physical exam which he could get
10 under federal rules. The plaintiff there said well, I
11 wouldn't be subjected to that in state court and that's an
12 important right I have, an important substantive right, yet
13 Sibbach followed the federal rules, and they did so in
14 language which I think undermines what defendants are saying
15 about the importance of these state statutes because Sibbach
16 said that's not the test. Quote, if we were to adopt the
17 suggested criterion of the importance of the alleged right we
18 should invite endless litigation and confusion where it's
19 confounded, close quote. It is not the importance.

20 What Stevens -- Justice Stevens indicated what is
21 important when he described Sibbach v. Willis as, quote,
22 reasoning that the phrase substantive rights embraces only
23 those state rights that are sought to be enforced in the
24 judicial proceedings, close quote. In other words, the cause
25 of actions being asserted in the case itself.

1 Now, I know this is all pretty abstract but
2 fortunately Justice Stevens gave us a practical test for at
3 least determining when this exception doesn't apply, and he
4 said if the provisions being asserted would apply not only to
5 the causes of action at issue but other causes of action of
6 that state or the laws of other states or federal claims then
7 we know it can't be part of the state's definition of that
8 single cause of action.

9 We know from this motion that the defendants
10 flunked that test because they are not trying to dismiss our
11 state claims, we have a federal claim under the federal
12 antitrust laws for injunctive and equitable relief, and they
13 want to throw that out on these same grounds, so under
14 Justice Stevens' test the state grounds do not apply and
15 Rule 23 does, and I think it is actually an illustrative
16 contrast of when the exception does apply with what Your
17 Honor did earlier with the Illinois Antitrust Act that was
18 referenced by defense counsel. That act within the Antitrust
19 Act itself says this act will not be enforced by a class
20 action and that fits what Justice Stevens is saying, it is
21 defined in that cause of action that won't include a class
22 action, we will respect that.

23 THE COURT: Okay.

24 MR. NOBLIN: For all of these reasons, there is a
25 long history and we cited it in our papers of class actions

1 consisting of government entities. There is no way that can
2 happen if defendants' arguments prevailed. And it is
3 important to understand that the logic of defendants'
4 argument does not depend upon the class consisting only of
5 government entities. If that logic is followed in the class
6 of all purchasers of some item that was allegedly
7 overinflated by an antitrust violation all of those classes
8 would have -- the government entities would have to be
9 stripped out.

10 So that leaves us that if these government entities
11 wanted to recover they would have to -- in every case across
12 the country they would have to retain counsel and appear on
13 their own behalf, and that's just not practical. I think
14 defendants admit that's not practical and would thwart the
15 case, but it has real-world consequences. For example, the
16 County of Oakland here in Michigan has about 1.2 million
17 residents, it has 12 full-time lawyers and one part-time
18 lawyer in the civil unit applicable. They have to handle all
19 the suits against the county at which there are over 100 at
20 times, and each attorney gets about 116 requests per year for
21 legal advice from within the county.

22 There is simply no way that they can retain and
23 appear in all of the cases, which means that what the
24 defendants are arguing is essentially the government agencies
25 should never be entitled to recover as consumers in

1 class-action cases, and, one, that would give defendants an
2 incentive -- would decrease the deterrence for them to
3 violate antitrust laws and everybody else, but it is also
4 nothing that any of the -- I would think many taxpayers in
5 these entities would want to see that other consumers can
6 recover except the one that spends their tax dollars.

7 THE COURT: Okay. Thank you. Brief response?

8 MR. CAROME: Thank you, Your Honor. I think most
9 of what counsel just said was already pretty much addressed
10 in my opening so I'm not going to try to cover everything at
11 all.

12 The County of Stanislaus, I just want to emphasize
13 again that there was no private counsel involved in the
14 California County of Stanislaus case, it was only government
15 counsel was involved. And the issue of the application of
16 the California government attorney statutes was not addressed
17 in the California Supreme Court, so that is not -- that's not
18 really relevant here.

19 Counsel said that they -- he's now finally said
20 they have authority from these five government entities to
21 sue, that's more than he was actually willing to say when we
22 wrote them about this. But we have moved for a more definite
23 statement under Rule 12(E) spelling out exactly how that is
24 the case so we can then respond to it and see whether, in
25 fact, what they are doing here is in conformity with the laws

1 of these local jurisdictions.

2 The -- one of counsel's last points was well, this
3 is going to leave the government entities out in the cold
4 somehow. Not at all. The tried and true way for these kinds
5 of claims to be litigated is through actions by the state
6 attorneys general on behalf of sometimes even the people of
7 the state but certainly it can be on behalf of the government
8 entities within the state. So this not a question of anyone
9 being left out in the cold, these issues can be addressed in
10 a far more appropriate way that conforms with these laws
11 through parens patriae actions on behalf of or other actions
12 on behalf where the state AG is running the case.

13 I think the other points have already been
14 addressed. Thank you very much for hearing us out at such
15 length.

16 MR. NOBLIN: Your Honor, if I may, just two brief
17 points in response to what was just said?

18 It is just not true that there was no private
19 counsel involved in the County of Stanislaus, there was for
20 the County of Stanislaus in addition to the county counsel.

21 THE COURT: What are you saying, there was private
22 counsel along with --

23 MR. NOBLIN: Along with the county counsel in
24 County of Stanislaus.

25 THE COURT: Okay.

1 MR. NOBLIN: And then as far as the argument that
2 the state attorney general can always bring all of these
3 actions for the local government entities, that's not always
4 true either. In the State of California the state attorney
5 general cannot represent the local government entities and
6 also then you run into the simple fact of limited
7 prosecutorial resources and that there is simply no way they
8 can bring every valid claim that they have and thus they
9 should be entitled, as are other persons and corporations, to
10 bring it by way of a class action which was designed for the
11 situation where individuals may not be able to bring it for
12 themselves.

13 THE COURT: Okay. Thank you.

14 MR. NOBLIN: Thank you.

15 THE COURT: All right. The Court will issue an
16 opinion on that interesting issue.

17 What's our next motion? This is the
18 vertical/horizontal motion?

19 MR. SKLARSKY: Yes, that's a good description, Your
20 Honor.

21 THE COURT: Okay.

22 MR. SKLARSKY: I am Charles Sklarsky. I represent
23 Mitsubishi Electric Company in this matter and the other
24 cases. I'm here with my colleague, Dan Fenske.

25 I'm speaking on behalf of all of the defendants

1 with regard to the joint motion that we filed and on behalf
2 of Mitsubishi and Mitsuba on behalf of the motion that
3 Mitsubishi filed on its own behalf and in which Mitsuba
4 joined in.

5 We filed this motion because we believed after
6 reading the complaint that it raised an issue the Court had
7 not considered before in connection with the auto parts
8 cases. We have also raised -- and that's the
9 vertical/horizontal issue that Your Honor has referenced. We
10 have raised a number of other motions -- issues in the
11 motions, but I only intend to address the vertical/horizontal
12 issue in argument today.

13 THE COURT: I realize the other motions are there.

14 MR. SKLARSKY: They are there but we stand on the
15 pleadings with respect to those.

16 THE COURT: But you do -- you argue about this
17 vertical/horizontal but plaintiff in response has said, and I
18 would like you to address this, that's not what they said in
19 their complaint.

20 MR. SKLARSKY: And I will address that and that's
21 really where I will direct the argument.

22 THE COURT: Okay.

23 MR. SKLARSKY: But before I get to that specific
24 issue I think it is important by way of background because it
25 would help us understand the horizontal/vertical issue to

1 understand the defendants in this case and the differences
2 between them --

3 THE COURT: Okay.

4 MR. SKLARSKY: -- based on what the complaint says.

5 So there are four defendants. The first defendant
6 is JTEKT. JTEKT is a manufacturer of electric power steering
7 assemblies, so what they sell is a finished product to
8 various markets, primarily to OEMs, original equipment
9 manufacturers, to the Fords, the Chryslers, the Nissans, the
10 Hondas of the world. They entered a plea of guilty with
11 respect to sales of those finished power steering assemblies
12 to manufacturers.

13 Showa, the other defendant, is also a manufacturer
14 and seller of these finished power steering assemblies, and
15 they entered a plea of guilty in connection with the sale of
16 a different kind of assembly than JTEKT manufactured or pled
17 to but nonetheless a finished power steering assembly.

18 There is Mitsuba, the third defendant. It is a
19 maker of electric motors and seller of electric motors, and
20 that motor is one component of this finished electric power
21 steering assembly.

22 THE COURT: But does the complaint say that Mitsuba
23 also manufactured power steering assemblies?

24 MR. SKLARSKY: Only by way of definition. The
25 plaintiffs in the complaint say a broad statement that all

1 defendants -- all four defendants manufactured and sold,
2 rigged bids and allocated markets in connection with the sale
3 of power steering assemblies, but then the complaint goes on
4 to define power steering assemblies as including all of the
5 component parts. So what the plaintiffs are saying, if you
6 sold an electric motor, put aside the issue of to whom you
7 sold it, if you sold an electric motor you have by their
8 definition sold an electric power steering assembly. Now,
9 that's sort of a slight-of-hand definition but that's what
10 they plead in their complaint.

11 It is like saying that if you sell a car and I --
12 my company sells a tire that goes on that car by definition I
13 have sold a car. It is clearly not the case but that's what
14 their complaint says, but I think we can get away from that
15 issue because of the response they filed.

16 So Mitsubishi is like Mitsuba, it makes motors and
17 it sells those motors. Neither Mitsuba nor Mitsubishi has
18 entered any guilty plea with respect to motors. So we said
19 well, who do we sell these motors to? We sell them to
20 companies that make these finished assemblies that a motor is
21 one component and that's to whom we sell those products. So
22 right away on the face of the complaint we have got two
23 defendants that are customers in the category of people that
24 are our customers, so that's a very unusual situation. So
25 that would be -- and if that were the sales they were

1 including that would be a vertical conspiracy. That's the
2 basis of our motion.

3 In response and in briefing plaintiff said no,
4 that's not the sales we mean to have as part of this
5 conspiracy.

6 THE COURT: So they may be but that's not what they
7 are talking about.

8 MR. SKLARSKY: Well, their complaint doesn't make
9 that clear and obviously I don't think they can amend their
10 complaint by the briefing on the issue. If that's really
11 what they are saying then they ought to amend their complaint
12 to make it clear that they are not including sales that
13 Mitsubishi or Mitsuba made to these assembly manufacturers.
14 They ought to say that. But if that's really their position
15 that addresses the issue of whether there is a vertical or
16 horizontal conspiracy, if they eliminate those sales that
17 eliminates the verticality issue, but it begs the question of
18 what are they saying the conspiracy is? Are they saying that
19 they are conspiring -- that all four defendants are
20 conspiring with respect to the sale of finished assemblies to
21 automobile companies? I mean, that would be a horizontal
22 conspiracy if that's what they are alleging, but if they are
23 alleging that they would have to establish some facts to show
24 that, indeed, Mitsubishi and Mitsuba even make finished
25 assemblies, they would have to plead some facts to show that

1 a conspiracy existed because they can't rely on guilty pleas,
2 we didn't plead guilty in those areas. You know, when did
3 this conspiracy start? What communications were there? Who
4 was involved with them? What RFQs were at issue? I don't
5 believe they can plead those in good faith.

6 Or are they saying that the conspiracy is that the
7 two assembly -- finished assembly manufacturers, JTEKT and
8 Showa, conspired with the motor manufacturers to rig the bids
9 in the sale of motors to the motor customers? If that's what
10 they are saying that would be a horizontal conspiracy but it
11 would be an implausible one. Why would the assembly
12 manufacturers want to raise the price of motors which they
13 buy from us?

14 Or are they saying the opposite, that the motor
15 manufacturers conspired with the assembly -- finished
16 assembly manufacturers to rig the bids on the prices of the
17 finished assemblies? That would make no sense, but I suppose
18 that would state a horizontal conspiracy but it is
19 implausible.

20 Or are they saying both? You can't tell from this
21 complaint, and their response is not helpful on that point,
22 it only eliminates the vertical issue.

23 Their other response is, well, it is horizontal so
24 it is just like wire harness, but it is not wire harness.
25 Wire harness really didn't have defendants that sold to each

1 other these parts. It didn't have that issue. So they have
2 cured that issue but they still leave us wanting to know what
3 conspiracy are they alleging? Why is it plausible and what
4 are the facts because they don't have guilty pleas for
5 Mitsuba or Mitsubishi that they can rely on? That's really
6 the essence of our argument.

7 THE COURT: Okay.

8 MR. SKLARSKY: Thank you.

9 THE COURT: Let's get them to answer those
10 questions.

11 MR. WILLIAMS: Good afternoon, Your Honor.
12 Steve Williams for the end payers.

13 I want to get right to the answer of the question
14 but I kind of feel like this is old wine in new bottles.
15 This is a motion to dismiss, there is no discovery and, in
16 fact, these defendants, including this defendant, when we
17 asked back last summer for them to tell us what are the parts
18 that were involved in their guilty pleas, they refused, they
19 would not tell us and they were not required to, but now they
20 come and say well, you didn't say who met with who, you
21 didn't say what was the agreement, we don't have to do that
22 at the motion to dismiss. So what did we plead? We pled
23 exactly what our complaint says and exactly what we say on
24 page 1 of our brief. We allege based on what we know now,
25 which is very little, that these four defendants conspired to

1 fix the price of electronic powered steering assemblies which
2 include steering motors. Okay. So all four of these
3 defendants make those parts, as counsel said.

4 THE COURT: I'm not understanding that. They
5 conspired to fix the power steering assemblies which include
6 motors?

7 MR. WILLIAMS: Correct.

8 THE COURT: Right.

9 MR. WILLIAMS: And there is no reason why those
10 defendants who make those parts because the motors are
11 required to be part of the assembly could not conspire
12 together to fix the prices to the OEMs, and, in fact, all of
13 them have pled guilty to fixing the prices of parts they sell
14 to OEMs.

15 THE COURT: But even if some of them don't do the
16 finished product, even if they don't do the assemblies --

17 MR. WILLIAMS: Correct, it doesn't matter.

18 THE COURT: -- they still conspire on the motors,
19 but why would the assembly manufacturer conspire on the cost
20 of the motor?

21 MR. WILLIAMS: Well, one, because they conspired to
22 fix the price to manufacturers.

23 THE COURT: Except to keep it low.

24 MR. WILLIAMS: Two, we are alleging a price cartel
25 and we are alleging market allocation, and I don't want to

1 keep repeating we don't have discovery but we don't. So it
2 is very plausible that when Nissan, who JTEKT, Mitsuba and
3 Mitsubishi have all admitted fixing prices to, say we need a
4 new electronic power steering assembly that Mitsuba, JTEKT,
5 Mitsubishi say we are going to respond to this bid from
6 Nissan, we want to coordinate the pricing, we want to make
7 sure this time JTEKT and Mitsubishi get the business,
8 Mitsuba, you will get it next time, you bid lower, now JTEKT
9 and Mitsubishi get together and say what prices are we going
10 to put in so we can raise the numbers to the level we want
11 without arising the suspicions of Nissan.

12 Now, the point of all of this, and counsel may get
13 up and say that's not in your complaint, our point is it
14 doesn't have to be in our complaint, that is what discovery
15 is going to tell us. For now the question is have we
16 plausibly pled enough to let us go forward in discovery to
17 find out if there is a claim here. I don't see how they
18 could argue we don't other than through discretion of it is a
19 horizontal rule of reason conspiracy, and it is not, or to
20 say Matsushita, that Supreme Court court case about summary
21 judgment standards that says you have to exclude
22 possibilities, we should import that standard to the motion
23 to dismiss stage which the Supreme Court in Iqbal went
24 carefully to say no, that's not what we are doing at all, and
25 I think this is the Morton's Salt case from the 6th Circuit

1 that explicitly rejects that.

2 In their arguments they say that's really not what
3 we are doing, we are just saying this is so implausible that
4 it doesn't make sense but I think in the end that's what they
5 are doing because they are asking the Court to accept their
6 version of what the ultimate facts will be by saying it is
7 impossible that we, us four, all admitted price fixers to the
8 same OEMs at issue in this case, it is impossible we would
9 have gotten together to conclude on the pricing we submit.
10 That's not a standard we have to meet now when there are
11 guilty pleas, when these markets are both so closely related,
12 we are not talking about the Southeast Area Milk case, I
13 think that was the name, which was at summary judgment where
14 the only way that the Court could read the evidence presented
15 at summary judgment was one of the three conspirators would
16 have agreed to be harmed, that was on a full evidentiary
17 record at summary judgment.

18 We are at a motion to dismiss, they don't have to
19 be harmed. It is entirely possible, for example, for
20 Mitsubishi to coordinate with JTEKT to whom it is going to
21 sell to ensure the pricing they both submit will satisfy
22 their interests in elevating those prices, will satisfy their
23 interest in securing Nissan against a competitor who might
24 seek that business, and there is no reason to then say well,
25 this turns it into a horizontal rule of reason conspiracy, it

1 is simply not the law.

2 And, in fact, in the cases they cite to, and I
3 think if I can find it it is called Care Heating, it is a
4 6th Circuit case, I think if I'm quoting it right it makes
5 the point of saying, and this was in the context of talking
6 about group boycotts to which the rule of reason does apply,
7 and the court says actions like price cartels are entirely
8 void of any redeeming value, they are always per se, and
9 that's what this is, this is a price cartel, this is not
10 within this rule of reason scenario.

11 But coming back to the more important point, it is
12 not implausible that these four guilty pleaders would have
13 worked together on the motors which are necessary to make the
14 steering assembly work when they are all responding to these
15 bids.

16 Earlier when the Court asked about some complaints
17 that are going to be filed and I mentioned the fact they
18 haven't been yet, it is for that very reason, we are further
19 along in understanding how the defendants' conspiracy worked
20 in this case and understanding that it is not this strict
21 division for just finished parts, that there is a
22 relationship because these defendants have to work together
23 to make this conspiracy work to the OEMs who ultimately buy
24 these parts.

25 And counsel mentioned the wire harness case and

1 said this -- plaintiffs just point to wire harness and they
2 say this isn't like that, but here is how it is like that.
3 If you recall in wire harness Denso's argument was we only
4 make electronic control units, that's not a wire harness, it
5 is part of the wire harness but it is not part of the wire
6 harness and we can't be in that case. That argument was
7 rejected, and there is -- really was no meaningful difference
8 between the argument that MELCO makes here and the argument
9 that Denso made there with the point being it is a motion to
10 dismiss. We don't know facts, we know the floor that the
11 guilty plea set and what has been presented to you in many
12 ways was that same argument from before; the guilty pleas say
13 A, and therefore that's all that ultimately discovery may
14 show. The guilty --

15 THE COURT: They never limited to the guilty plea?

16 MR. WILLIAMS: The guilty pleas for us are the
17 floor, and they are entitled to go forward to try to
18 determine what are the rest of the facts but the question for
19 now is is what we pled so implausible that we shouldn't have
20 an opportunity to plead that, that we should be forced to go
21 back and guess what it is these defendants did before we can
22 state a claim when they have all pled guilty to a per se
23 price-fixing cartel? I think the answer is no, that this is
24 enough to go forward and the evidence and the facts will show
25 what really took place but we can't be forced into this box

1 of having to guess what the ultimate answers will be while
2 they on their side have those facts and come back and say we
3 wouldn't do this because then it would have made it cost more
4 for the tier one or tier two, we don't know those answers
5 now.

6 THE COURT: Okay.

7 MR. WILLIAMS: But we do know -- and there are
8 other arguments made in the papers and I'm not going to
9 address them now that counsel has chosen not to so I will
10 submit on the papers as to those.

11 THE COURT: All right.

12 MR. WILLIAMS: Thank you.

13 THE COURT: Counsel, reply?

14 MR. SKLARSKY: Very briefly, Your Honor.

15 Arguments of counsel are fine but they are not in
16 the complaint, and what we are entitled to is not whether all
17 of his statements, we are entitled to a complaint that
18 clearly states with well-pleaded facts the nature and scope
19 and definition of the conspiracy with which we are charged.
20 This complaint does not do that. And once they have clearly
21 defined the nature, scope and definition of the conspiracy
22 then they need to well plead some facts that show it is
23 plausible, not counsel's argument about why it is plausible
24 but some facts that establish its plausibility.

25 We don't have to define from Supreme Court justices

1 about that requirement. Everybody agrees that's the law, and
2 the starting point is to clearly describe the conspiracy, and
3 they haven't done that. They have relied on this definition
4 which throws in all of the component parts as part of a
5 finished assembly. Well, yes, in reality they are a finished
6 assembly but when you sell an electric motor you are not
7 selling a finished assembly, those are different things
8 although they have eliminated that difference by their
9 definition in the complaint.

10 THE COURT: Okay.

11 MR. SKLARSKY: I will say one other thing just
12 about wire harness, when Ford or Chrysler or whoever goes to
13 buy they don't buy a wire harness system, they can buy a
14 power steering assembly, that is a part, it has a lot of
15 components to it but they buy a part, but our understanding
16 of the industry is in wire harness they call it a system but
17 it consists of lots of parts which are sold separately, not
18 as an integrated system, and that's an important distinction
19 it seems to me between this case and the wire harness case.

20 THE COURT: So your distinction is that the OEMs
21 put together the wire harness system themselves?

22 MR. Sklarsky: Yes, and all of those parts.

23 THE COURT: And here you are saying you sell the
24 system all together, the power steering --

25 MR. SKLARSKY: Right, we -- at least two of the

1 defendants do. Thank you.

2 MR. WILLIAMS: Your Honor, I just want to respond
3 very briefly.

4 I was criticized for talking about things not in
5 the complaint, which I don't think I did, but the argument
6 just now about what wire harnesses are as bought by Ford or
7 GM, that's nowhere in any of the facts, and I think it
8 illustrates why we should get to discovery to find out what
9 the facts are and not have counsel just asserting how it is
10 that GM buys a wire harness.

11 THE COURT: Okay.

12 MR. WILLIAMS: Thank you.

13 THE COURT: Okay. Next actually continuing
14 along -- do we have another -- we have another part of a
15 motion, part of it was settled? No, it was all settled.
16 Okay.

17 MR. WILLIAMS: Well, I think we have completed the
18 agenda.

19 THE COURT: I'm looking at MELCO but MELCO was the
20 one that we took care of today.

21 MR. SKLARSKY: We did, Your Honor. There was a
22 third part to it that Showa and American Showa is on the
23 agenda but --

24 THE COURT: But there is no argument, I think
25 they --

1 MR. WILLIAMS: I believe, Your Honor, that's all
2 been resolved, there is nothing to address with the Court
3 today.

4 THE COURT: Okay. So that's it.

5 MR. WILLIAMS: That's it.

6 THE COURT: Okay. Anything else before we get
7 dismissed, anything we need to handle? All right. Our next
8 meeting then will be May 6th. Everybody have a safe trip
9 back.

10 MR. WILLIAMS: Thank you, Your Honor, and at least
11 a few of us might see you before.

12 THE LAW CLERK: Court is adjourned.

13 (Court recessed at 12:52 p.m.)

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CERTIFICATION

I, Robert L. Smith, Official Court Reporter of the United States District Court, Eastern District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing pages comprise a full, true and correct transcript taken in the matter of AUTOMOTIVE PARTS ANTITRUST LITIGATION, Case No. 12-02311, on Wednesday, January 28, 2015.

s/Robert L. Smith
Robert L. Smith, RPR, CSR 5098
Federal Official Court Reporter
United States District Court
Eastern District of Michigan

Date: 02/04/2015

Detroit, Michigan